IN THE

# Supreme Court of the United States

October Term, 1923

THE IDAHO IRRIGATION COMPANY, LIMITED; THE EQUITABLE TRUST COMPANY OF NEW YORK, and LYMAN RHOADES, as Trustees, and M. R. KAYES, Trustee (Defendants) and FRANK T. DISNEY, *et al.* (Intervenors), *Appellants*,

*against*

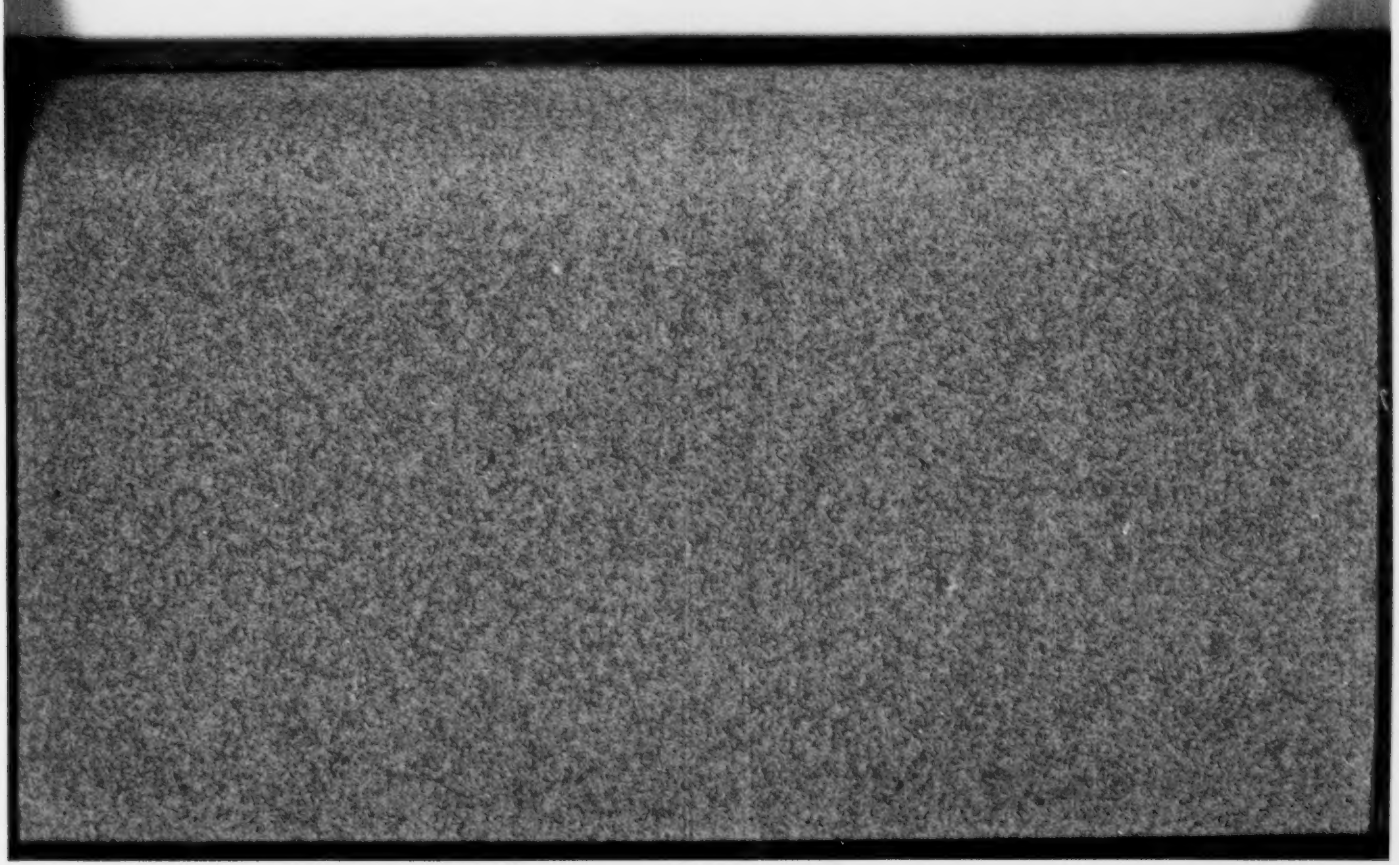
FRED W. GOODING, NOVINGER & DABBAH SHEEP COMPANY, LIMITED, a Corporation; T. B. JONES, J. H. CULBERTSON, N. W. SIMS, W. L. BIGGS, LOUIS JOHNSON, C. B. HESS and FRANK R. GOODING (Plaintiffs), and THE STATE OF IDAHO (Intervenor), *Appellees*.

No. 324

## BRIEF OF APPELLANT, IDAHO IRRIGATION COMPANY, LIMITED

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

GORDON M. BUCK,
RAYMOND J. SCULLY,
*Counsel for Appellant, Idaho Irrigation Company, Limited.*



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### *Statement of Facts.*

This is an appeal from a final decree (filed August 7, 1922, and amended October 4, 1922) of the United States Circuit Court of Appeals, for the Ninth Circuit, affirming, except as therein modified, the final decree of the District Court of the United States, for the District of Idaho, Southern Division (R., 684-6).

The appellees took a cross appeal (No. 336) from so much of the decree of the Circuit Court of Appeals as modified the District Court's decree, and also from the order of the former court denying their petition for a rehearing (Cross App., R., 1-8).

The suit arises under the Carey Act (approved August 18, 1894; 28 Stat. L. 422, Sec. 4) as amended, and is brought here under Section 241 of the Judicial Code. The suit was originally instituted on December 7, 1917, in the State court, and was removed to the Federal court because the construction of the Carey Act and its amendments was involved (R., 125).

The appellants are the Idaho Irrigation Company, Limited (hereinafter called the "Company"), which has built an irrigation system (R., 16-7); The Equitable Trust Company of New York, Lyman Rhoades and M. R. Kayes, trustees for the Company's bondholders (R., 17-8); and certain individuals who are owners of lands reclaimed by the Company's irrigation works, and of appurtenant water rights purchased by them from the trustees after the institution of this suit and after the filing by the plaintiffs of a so-called *lis pendens* (R., 168-70). The Company and the trustees were the original defendants (R., 15). The other appellants intervened in the District Court as parties defendant (R., 166).

The appellees are the State of Idaho and certain individuals who, at the time this suit was commenced, were owners of Carey Act lands reclaimed by the Company's irrigation works and of appurtenant water rights (R., 27). The State intervened in the District Court as a party plaintiff. The other appellees were the original plaintiffs.

The decree of the District Court (because of the alleged inadequacy of the water supply) enjoined the Company and the three trustees from selling water rights or shares in the Company's irrigation system, and declared of no effect the water rights acquired by the other appellants after the institution of this suit and the filing of the *"lis pendens"* (R., 152). The Circuit Court of Appeals affirmed this decree, except that it excluded from the injunction 5,322.26 water rights (R., 685) appurtenant to lands owned by the trustees when the suit was commenced (R., 682).

By the terms of the Carey Act as amended, the Secretary of the Interior, with the approval of the President, is authorized to agree with a public land State to patent to it such desert land within its borders as the State may cause to be reclaimed. The State is required to submit to the Secretary of the Interior, for his

approval, a map of the lands and a plan of the contemplated irrigation system, also to show the source of the water supply. The State may itself do the work of constructing the irrigation system, or may cause this work to be done by others, and is authorized to create a lien on the lands for the cost of this work;

> "and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State" (Act of June 11, 1896; 29 Stat. L. 434).

The State of Idaho accepted the conditions of the Carey Act and vested the selection, management and disposal of lands granted to it thereunder in the State Board of Land Commissioners.*

> Idaho Revised Codes, Sec. 1613 (Compiled Stats. of 1919, Sec. 2996);
> *Pierson* v. *State Board of Land Commissioners*, 14 Idaho, 159.

Pursuant to the Carey Act as amended, the United States agreed with the State of Idaho to patent to it certain lands, whenever an ample supply of water was furnished "in accordance with the provisions of said acts of Congress and with the regulations issued thereunder, and with the terms of this contract" (R., 38).

It was further agreed that when proof thereof was submitted to the Secretary of the Interior and examined by him "and found to be satisfactory" patents should "issue to said State, or to its assigns, for the tracts included in said proof" (R., 40).

By contract with the State, the Company thereafter agreed to construct the irrigation works (R., 42, 64).

*By Idaho Laws, 1919, c. 8, Sec. 38, the powers and duties of the Land Commissioners were vested in the Department of Reclamation.

The Company was to obtain reimbursement for the cost of this work by the sale of water rights or shares (R., 73, 83); and the State agreed not to sell any of the land, unless the prospective purchaser held a contract with the Company "for the purchase of sufficient shares or water rights in said reservoir and irrigation system for the irrigation of" his land (R., 50). The water rights are represented by shares of the capital stock of the Big Wood Reservoir and Canal Company, Limited (hereinafter called the "Canal Company"). Its authorized capital stock consists of 150,000 shares. This "amount represents one share for each acre of land which may hereafter be irrigated from said canal." The Canal Company was used as "a convenient method of transferring the ownership and control of said canal from the" Company to the purchaser of water rights, of operating and maintaining the canal and of collecting the tolls therefor (R., 76-7).

After the construction of the irrigation works, the State applied for patent. Thereupon, as required by the Regulations of the Land Department, the Register of the United States Land Office at Hailey, Idaho, published for nine weeks in the Richfield Recorder ("a newspaper of established character and general circulation, * * * designated by the Register as published nearest the land") a notice that the State had applied for patent and that protests or contests would be received on the ground of failure to comply with the law (R., 444). A similar notice was posted for thirty days of the same period in the local land office (R., 445).

In accordance with the regulations of the United States Land Office, the State submitted, among other papers, affidavits of the State Engineer and a certificate of the Governor. The sworn statement of the Engineer was as follows:

> "I am of the opinion that an ample supply of water for the reclamation of all of these lands is actually furnished in a substantial reservoir and canal, and in a sufficient quantity to reclaim the lands in question from their arid character, as contemplated under the act commonly known as the Carey Act; and that the State of Idaho is warranted in making this application to the Honorable Secretary of the Interior, asking that patent issue forthwith for the lands embraced in the accompanying lists" (R., 445-6; see also R., 452).

The Governor certified with respect to the lands in question

> "that the laws of said State relating to the said grant from the United States have been complied with in all respects as to the following lists of lands which is hereby submitted on behalf of the said state for the issuance of patent under said acts of congress" (R., 451).

In addition to having before him the proof submitted by the State, the Secretary of the Interior also caused an "examination in the field" to be made, to ascertain whether or not the lands had been "reclaimed within the meaning of the Carey Act" (R., 442). Thereafter he issued a patent to the State for 117,677.24 acres of land (R., 440). The patent recited that the State had "duly complied with all the conditions and requirements of" the Carey Act and its amendments (R., 441).

The total number of water rights or shares which, by contract with the State, the Company was permitted to sell was 150,000. This number represented one share for each acre of land that might thereafter be irrigated from the Company's works (R., 77). It will be noticed that the number of water rights authorized was considerably greater than the acreage patented under the Carey Act. The water rights not issued to the settlers on the patented acreage were to be sold to the owners of

other lands "which are susceptible of irrigation from this system" (R., 68, 73-4). Of these 150,000 water rights, 88,835.71 had been sold at the time of the commencement of this suit. 69,107.20 had been sold to the owners of Carey Act lands and 19,728.51 had been issued to the owners of other lands. 12,045.80 of these 19,728.51 water rights had been traded for "decreed water"; that is, for water rights having priority over the Company's permits for the diversion of water (Defendants' Exhibit 11). The 12,045.80 rights thus issued by the Company, merely represented a substitution of the Company's water rights for rights that were prior thereto. It resulted in placing the owners of prior water rights on a parity with the purchasers of the Company's water rights; and was analogous to the issue of refunding bonds to take up prior lien bonds.

The contracts for the sale of water rights and the sums remaining due thereunder had been pledged under the Company's mortgage. Of the 88,835.71 water rights sold, 8,467.07 had, at the time this suit was commenced, been acquired by the defendant trustees through the foreclosure of the lien for the unpaid balance of purchase price, and 4,255.57 were subsequently so acquired (Defendants' Exhibit 11). These 12,722.64 shares were held by the trustees subject to the lien of the Company's mortgage (R., 17, 24, 33). To recapitulate: At the time the suit was begun, the Company had issued 88,835.71 water rights, of which 76,789.91 had been sold and the remainder traded for prior water rights. Of these 76,789.91, the defendant trustees had acquired 12,722.64 through foreclosure. It will be noted that the number of water rights issued by the Company was considerably less than the number of patented acres, the latter number being 117,677.24.

The District Court enjoined the Company and the other defendants from selling any additional water rights. It treated the 12,722.64 water rights held by the trustees as belonging to the Company and included them

in the injunction. The injunction was issued on the theory that the water rights already sold by the Company (excluding those held by the trustees) compelled it to deliver an amount of water in excess of the available supply. The Circuit Court of Appeals affirmed this decree, with the modification to which reference has already been made.

Both lower courts declined to be bound by the determination of the Secretary of the Interior, that an ample supply of water had been furnished to irrigate the patented lands. They proceeded to determine the question independently of the Secretary's finding. The Circuit Court of Appeals regarded the Company as being under a contract obligation to furnish a specific amount of water to each person holding a water right, rather than a *pro rata* interest in the entire water supply as apportioned by the Secretary of the Interior. The District Court held the Company obligated to deliver not a specific amount, but still an amount in excess of that available under the Secretary's apportionment.

The Company could obtain reimbursement for its disbursements in constructing the irrigation works only through the sale of water rights (R., 83). The decision of the lower courts prevents the Company from obtaining reimbursement for a large part of its expenditures, and results in a reapportionment of the water supply. It leaves without any water a large portion of the patented lands. The unirrigated lands necessarily remain desert lands, although they were patented to the State on the theory that the State had reclaimed them; and although the State is forbidden to use or dispose of them in any way, "except to secure their reclamation, cultivation, and settlement" (R., 39).

After brushing aside the determination of the Secretary of the Interior (which followed the proofs submitted by the State officials) that an ample supply of water to irrigate the patented lands had been furnished, the lower courts proceeded to determine the amount of

water necessary for irrigation purposes. No issue was raised as to the capacity of the irrigation works or canals. Apart from the question of the conclusiveness of the Secretary's determination, the chief controversy was as to the acreage the water available would properly irrigate.

As the unit of water available, the trial court and the parties for the most part took the acre foot* at the farmers' headgates, resolving all losses before that point into such unit and all losses after that point into the "duty of water."†

Some evidence, however, stated the water available in acre feet at the main canal heads or in the streams from which the supply is taken, thus raising a question as to the amount of loss sustained in transmission to the farmers' headgates. The District Court found this loss to be 35 per cent (R., 150). There was no evidence that placed this loss at more than 30 per cent. A number of the appellees' witnesses put it at the latter figure (R., 247, 252, 256, 258, 260, 264, 267, 279) and the Assistant State Engineer, one of their witnesses, testified that he had determined the loss to be 29.7 per cent (R., 264).

The amount of water available at the farmers' headgates was alleged in the original complaint to be enough "to furnish and deliver one-eightieth of one cubic foot of water per second of time per acre of land to 70,000 acres of land and no more" (R., 16). By computation, assuming a continuous flow during the irrigation season as claimed by the appellees (R., 234), the amount of water available is thus alleged to be 267,750 acre feet. At the suggestion of the trial Court (R., 240), the appellees amended their complaint during the trial (R., 31-2) to allege 220,688 acre feet as available. Their witnesses

*The amount of water required to cover one level acre one foot deep.
†The amount of water in acre feet required to irrigate one acre during the irrigation season.

and counsel stated the water available at the farmers' headgates to be from 220,660 to 265,381 acre feet.*

The trial court found the water supply insufficient to meet the demands of the outstanding contracts (R., 151) and stated that it did not attempt to determine the exact amount of water available. It intimated, however, that the water available was 122,817 acre feet (R., 150), and again that it was "a little less than 150,000 feet" (R., 151). In reaching this decision, it considered neither the appellees' nor the appellants' allegations, or testimony, as to water available (R., 49-51). On the issue of duty of water, the appellants put in evidence the Company's records of water delivered at the main canal heads and at the farmers' headgates over a period of years (R., 572), *and the trial court based its decision on the assumption that the only water available was the water so delivered.* These deliveries, however, were made when the acreage in cultivation ranged as low as 17,464 acres, much less than the acreage sold (R., 564); and such deliveries were made for the most part before the spillway on the reservoir dam was raised to its present height (R., 263). This improvement was made after the year 1917 (R., 261, 263).

The appellants contended on the trial for a duty of two acre feet for the irrigable area. The trial court found the duty of water to be two and three-quarter acre feet for the area of the project, without any allowance for non-irrigable tracts or for roads, homesites and land lying fallow, for which irrigation would not be required. Even on the basis of the duty of water determined by it, the District Court found that a smaller acreage could be reclaimed than was actually the case, for the following reasons:

(1) Its finding was based, not on the amount of wa-

*225,000 (R., 238); 255,423 (computation from figures in R., 243); 220,689 (computation from duty and acreage in R., 249); 220,668 (Plaintiffs' Exhibit 3, R., 252, summarized in R., 256); and 265,381 (R., 305).

ter available, but on the average amount actually delivered. During the greater portion of the period considered, the amount delivered, owing to the small acreage then under cultivation, was much less than the amount available; and the amount available in recent years has also been increased through raising the height of the spillway on the reservoir dam.

(2) No allowance was made for non-irrigable or non-irrigated lands.

(3) An excessive transmission loss was applied.

The Company had made elaborate experiments on the irrigation project to ascertain the best methods of husbandry and the most efficient use of water. The results of these experiments with reference to the duty of water were excluded by the trial court (R., 576).

After the approval of the plan of the proposed irrigation works and of the sufficiency of the source of the water supply both by the Federal and by the State officials, the Company expended more than $3,000,000 in constructing the works (R., 83, 653). It has constructed these works in accordance with the approved plan. Its permits for the diversion of water were approved. On the completion of the works, the State applied for patent, representing that an adequate water supply had been furnished. Notice of this application and an invitation to contest it were duly published and posted. The Company could obtain reimbursement for its outlay only through a sale of water rights, the cost of the irrigation works being apportioned to them (R., 83, 92). The decision of the lower courts prevents the Company from selling a large number of these rights. The effect of the decision is not only to cause heavy loss to the Company and its bondholders, but also to

prevent the reclamation of a substantial portion of the desert lands which have been patented to the State upon its representation and the Secretary's finding that ample water has been furnished for their reclamation.

### *Specification of Errors.*

The final decree of the District Court, as modified by the Circuit Court of Appeals, is erroneous for the following reasons:

1. The water supply was held inadequate for the patented lands, notwithstanding the determination of the Secretary of the Interior to the contrary. The administration of the public lands is placed by the Congress in the hands of the Federal officials. The Secretary's determination is conclusive in the absence of fraud. It cannot be collaterally attacked.

2. The water rights issued by the Company were erroneously construed as not being in harmony with the Carey Act and with the Secretary's decision thereunder. They were construed as entitling holders to a specified amount of water, so large that there will not be enough for the entire patented acreage. The plaintiffs are entitled only to a pro rata portion of the water supply apportioned in accordance with the Secretary's determination. Water rights purporting to entitle the plaintiffs to more are void as to the excess.

3. Neither the State nor its Commissioner of Reclamation can reapportion the water supply to a smaller acreage than the Secretary of the Interior has determined it was ample to irrigate.

4. The plaintiffs were awarded equitable relief, although they neither had clean hands nor offered to do equity.

5. The water right contracts were erroneously given a construction that made them conflict with public policy and that made their enforcement inequitable. The award of specific performance of these contracts as so construed was an abuse of discretion.

6. The courts below erred in determining the amount of water available and the amount required for reclamation.

7. The water rights owned by the trustees are outstanding, and in all other respects are on a parity with those owned by the plaintiffs. This subject will be discussed in the brief filed by the trustees' counsel.

## I.

## The determination of the Secretary of the Interior that an ample supply of water to reclaim the lands has been furnished cannot be collaterally attacked and is binding on the parties to this suit.

### (1) The decision of the Land Department upon questions of fact is conclusive.

This is so well settled as scarcely to require the citation of authority.

In *Burke* v. *Southern Pacific R. Co.*, 234 U. S., 669, 710, the plaintiff located mining claims on land that the United States had patented to the defendant railroad company as non-mineral, and attacked the railroad company's patent. The patent by its terms excluded mineral lands from those granted by it. The Circuit Court of Appeals certified certain questions to this Court, among others the following:

> "4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?"

The answer to this question was that: "It is conclusive upon a collateral attack."

In *Bishop* v. *Gibbon*, 158 U. S., 155, 166, the Congress had by statute confirmed the title to land then occupied as missionary stations. Pursuant to this statute, the plaintiff sought to recover a tract of land. The Secretary of the Interior decided against his contention. This Court affirmed a decree of the Circuit Court dismissing the bill, and said:

> "It is a question of fact whether there was at Vancouver a missionary station, and also a like question, if one existed, how much land it occupied. The rule is that in the administration of the public lands the decision of the land department upon questions of fact is conclusive, and only questions of law are reviewable in the courts. *Johnson* v. *Towsley*, 13 Wall., 72; *Warren* v. *Van Brunt*, 19 Wall., 646; *Shepley* v. *Cowan*, 91 U. S., 330; *Moore* v. *Robbins*, 96 U. S., 530; *Marquez* v. *Frisbie*, 101 U. S., 473; *Vance* v. *Burbank*, 101 U. S., 514; *Quinby* v. *Conlan*, 104 U. S., 420; *Smelting Co.* v. *Kemp*, 104 U. S., 636; *Steel* v. *Smelting Co.*, 106 U. S., 447; *Baldwin* v. *Stark*, 107 U. S., 463; *United States* v. *Minor*, 114 U. S., 233; *Lee* v. *Johnson*, 116 U. S., 48; *Wright* v. *Roseberry*, 121 U. S., 488; *Cragin* v. *Powell*, 128 U. S., 691; *Knight* v. *U. S. Land Association*, 142 U. S., 161; *United States* v. *California & Oregon Land Co.*, 148 U. S., 31; *Barden* v. *Northern Pacific Railroad*, 154 U. S., 288, 327."

*United States* v. *R. Co.*, 218 U. S., 233, 243;
*Whitcomb* v. *White*, 214 U. S., 15, 19;
*De Cambra* v. *Rogers*, 189 U. S., 119, 122;
*Johnson* v. *Drew*, 171 U. S., 93, 99.

**(2) The issue of patent is a determination by the Secretary of the Interior that an ample supply of water has been furnished.**

The purpose of the Carey Act is "to aid the public land States in the reclamation of the desert lands therein" (28 Stat. L. 422; *Twin Falls, etc., Co.* v. *Caldwell*, 272 Fed., 356, 358, C. C. A.). In *Twin Falls, etc., Co.* v. *Alexander*, 260 Fed., 270, 274, this purpose is thus stated:

> "The primary purpose of the Carey Act was, not to enable the government to divest itself of title to its desert lands, but to secure their irrigation and reclamation; reclamation is the only consideration for the donation or grant, and is a condition precedent to the exercise of the power to grant."

Before the lands are segregated or a contract made with the State to patent the lands to it, the State is required by that act "to exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and to prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation." In the original act it was provided that as fast as the State furnished "satisfactory proof" to the Secretary of the Interior "that any of said lands are irrigated, reclaimed and occupied by actual settlers patents shall be issued to the State or its assigns" therefor.

As amended by the Act of June 11, 1896, the statute now provides that

> "when an ample supply of water is actually furnished in a substantial ditch or canal, or by ar-

> tesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation" (29 Stat. L. 434).

The contracts between the United States and the State expressly provided for the issue of patent upon the terms of the statute last mentioned (R., 38). The issue of patent to the State for the lands in question (R., 440), therefore, necessarily involved a determination that "an ample supply of water is actually furnished in a substantial ditch or canal," to reclaim them; for such a determination was a condition precedent to the issue of the patent, and the issue of a patent constitutes a finding of the necessary prerequisites.*

> *Steel* v. *Smelting Co.*, 106 U. S., 447, 450-1;
> *Smelting Co.* v. *Kemp*, 104 U. S., 636, 640.

In the latter case the Court said that the issue of a patent

> "not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

The approval of the plan of the irrigation works was merely a preliminary estimate made by the Secretary of

*The appellees contended in the Circuit Court of Appeals "that the Secretary of the Interior must be held as a matter of law to have issued the patent to the State of Idaho upon the unwritten condition subsequent that an ample supply of water existed for the reclamation of the" patented lands.

the Interior.* The patent issued, however, only after completion of the irrigation works and after careful investigation by the Federal officials as to the adequacy of the water supply (R., 441-2). The decision of the Secretary was not *ex parte*, but was made upon notice published and posted in accordance with the Regulations. The notice expressly invited protests and contests (R., 444). Any one who desired to contest the adequacy of the water supply was thus given the opportunity to be heard.

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*In *State* v. *Twin Falls, etc., Co.*, 30 Idaho, 41 (166 Pac., 220), the Supreme Court of Idaho adopted the view that even the preliminary estimate was final. Although it subsequently receded from this view, the following extract from its opinion is instructive:

> "Thus it will be seen that before making any contract, the plan for the irrigation works or system must be approved by both the state and national authorities and the sufficiency of the water supply determined by each. Clearly, the general plan is one providing that the cost of the reclamation of such lands shall be assessed as a benefit against the land to be paid by the settler, and that the benefit is assessed through the medium of the state board of land commissioners.
>
> "Of course, the engineers of the construction company examined the sources of water supply, and no doubt satisfied themselves that there would be sufficient water to reclaim the land asked to be segregated; *but the determination of the question of the water supply was up to the state and the Secretary of the Interior.* In the first instance, if upon such an application the Secretary of the Interior concludes that the water supply is not sufficient, he refuses the application for segregation; and if the state concludes that the water supply is not sufficient, the application is denied. *But after the state has decided that question in favor of an ample supply of water, and the Secretary of the Interior has also decided that an ample supply of water exists, that question is settled, so far as the government and the state are concerned.* That question was evidently understood to have been fully settled by proper authority before the construction company would undertake the expenditure of from $2,000,000 to $3,000,000 in constructing an irrigation system. Is it possible that any good business man or corporation would consent to the expenditure of $2,000,000 or $3,000,000 in the construction of an irrigation system, leaving the question open for the state and government to decide thereafter whether there was a sufficient water supply for the project? It seems to us not." (Italics ours.)

**(3) The Circuit Court of Appeal's opinion is fallacious because it assumes that the Company could by contract reduce the acreage to be reclaimed.**

In the case at bar the Circuit Court of Appeals declined to be bound by the decision of the Secretary of the Interior, and said:

> "We cannot accept that view of the law as applicable to this controversy. This suit is upon a contract between the parties. Neither the United States nor the Secretary of the Interior was a party to this action" (R., 679).

That neither the United States nor the Secretary of the Interior was a party to this action emphasizes the fact that it is a collateral attack on the Secretary's determination. The Circuit Court of Appeals seeks to avoid the conclusiveness of the decision of the Secretary as to the adequacy of the water supply, because the Company had by contract assumed a specific obligation over and above the obligation imposed by the Secretary's decision; in other words, that the Company had contracted to deliver such an excessive amount of water per acre, that the total supply of water would not be sufficient for the acreage which the Secretary of the Interior had determined the water supply was ample to reclaim. The decision of the lower courts leaves a large part of the patented acreage without water and in effect reduces the area of the project. As a result of the decision, a large part of the project must remain desert land, notwithstanding the Secretary's decision that an ample supply of water has been furnished to reclaim it.

In considering the subject, this Court must remember that the duty of water is not determinable by any

precise standard. On this subject the Circuit Court of Appeals said:

> "This case, like many others of the same general character, presents questions difficult of adjustment in the administration of the desert land laws for different localities, giving rise to controversies between the parties, to determine the just and equitable rights of each. If there is a failure in this respect anywhere in the procedure, it is not necessarily because of lack of good faith in the conduct of the parties, or lack of careful investigation on the part of the officials; but it is rather by reason of the diverse conditions under which desert lands can be reclaimed in the different localities of the desert region. The experience of one locality in administering the law may be wholly inapplicable in another, requiring a new adjustment of rights and duties with respect to the new and unexpected conditions" (R., 651-2).

In *State* v. *Twin Falls, etc., Co.*, 30 Idaho 41 (166 Pac., 220), the State Supreme Court said:

> "There is also another factor affecting irrigation projects, and that is the same volume of water will suffice to irrigate much more land after the land has been cultivated a few years than it will in the earlier stages of the irrigation thereof. Taking the fluctuations of the water supply in the streams year after year in arid regions, the variableness of the seasons and the fact that the same supply is much more efficient in an older project than it is in a new one, it will at once be observed that the question of water supply for a certain tract of land is a question of estimate. If the proof presented to the Secretary of the Interior had not been sufficient, he would not have approved the project, since in this case no question of fraud arises. When this plan was approved, the question of the water supply was determined."

The evidence shows that if the water available is apportioned over the lands comprising this project they

will produce agricultural crops. If the area of the project is decreased and the amount of water available for the remaining land correspondingly increased, the crops produced will up to a certain point be improved. Finally, however, a point of saturation is reached and the application of more water constitutes a detriment instead of a benefit. Moreover, an increased application of water does not proportionately improve the crops produced (R., 389, 403, 458, 506).

The administration of these desert public lands is in the charge of the United States Land officials. It is for those officials to determine the area that can most beneficially be irrigated and reclaimed from a given water supply. It is not competent for the courts to ignore the determination of the Secretary of the Interior, that a tract of desert land shall be reclaimed from a given water supply, and to reapportion the supply so as to irrigate part of the tract more heavily and leave the remainder desert land.

The reasoning of the Circuit Court of Appeals is fallacious because it assumed that the Company could contract to apply the entire water supply to a smaller acreage than the land officials had determined the water supply was sufficient to reclaim. The State had no authority to reapportion the water supply. Much less could the Company do so. The Carey Act specifically provided: "that any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation *in accordance with and subject to the provisions of this section*"; and the State was forbidden to use the lands in any way "except to secure their reclamation, cultivation, and settlement." (Italics ours.)

The powers of the Company with respect to this project flow from its contract with the State and that contract is subject to the Carey Act. In other words, the contract is subject to the determination made by the Secretary of the Interior as to the number of acres that shall be reclaimed by the irrigation system, and as to

the amount of water that shall consequently be available for each acre.

Patent issued to the State in consideration of its having furnished ample water to reclaim the lands so granted. Having obtained the lands on this basis, the State had no right to divert water that was appurtenant to a portion of the patented acreage in order to irrigate the remainder more heavily. By accepting the grant on the terms set forth in the Carey Act, and its amendments, the State consented to those terms. It consented that the water supply, in consideration of which it had obtained the lands, should be apportioned in accordance with the Secretary's determination.

We shall later discuss the construction to be given to the Company's contracts. When properly construed, they purport to impose no obligation on the Company to furnish water in excess of a *pro rata* portion of the entire supply. If they attempted to impose a greater obligation they would not accord with the provisions of the Carey Act; and the attempt to impose an obligation to furnish the excess quantity of water would be void. Manifestly no contract could be sustained the effect of which would be to override the decision of the United States officials in the administration of the public lands; and they have determined the number of acres that can be reclaimed from the Company's irrigation system. It will not do to say that the Company has by contract overthrown this determination and obligated itself to furnish so large an amount of water to a portion of the acreage involved in the project that the remaining acreage must remain desert land. The purpose of the Congress in enacting the Carey Act was to reclaim the public desert lands (*Twin Falls, etc., Co.* v. *Caldwell*, 272 Fed., 356, 358, C. C. A.). Neither the State nor the Company can by contract or otherwise defeat that purpose.

**(4) The effect of the Circuit Court of Appeals' decision in the case at bar.**

The Circuit Court of Appeals said in the case at bar that it saw no reason for changing its opinion on the question of the conclusiveness of the Secretary's finding, as stated by it in the case of *Twin Falls Oakley Land & Water Co.* v. *Martens*, 271 Fed., 428, 433:

> "We believe that, in a proceeding to ascertain whether patents should issue, the finding by the Land Department upon the question whether the water supply is ample is conclusive for the purpose of issuing patent; but that is far from ruling that it is conclusive upon the question whether the plaintiff construction company has provided water at the rate of 1.5 acre-feet per acre as required by its contract with the settler. That is a matter which the Land Department has not undertaken to pass upon, and could not" (R., 680).

The decision of the Circuit Court of Appeals that the Land Department's finding is conclusive upon the question whether patent should issue, but inconclusive upon the question whether the construction company has furnished an adequate amount of water, results in making the Land Department's finding binding upon the shadow but of no effect upon the substance. To uphold the patent to Carey Act lands, but to enjoin the sale of water rights for them, renders the lands worthless and creates a failure of the consideration upon which they were granted to the State; for they were granted to the State upon the finding of the Secretary that an ample supply of water had been furnished to reclaim them. Without water they are desert lands and of no value. The *pro rata* sale of water rights to the purchasers of these lands is an essential part of the plan that was approved by the Secretary of the Interior and inheres in the scheme of reclamation contemplated by the Carey

Act and its amendments. The State statutes recognize this and provide as follows in the chapter relating to Carey Act lands:

> *"The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State.* Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; * * * ." (Italics ours.)
>
> Idaho Rev. Codes, Sec. 1629;
> Idaho Comp. Stat. of 1919, Secs. 3018 and 3019.

In the case at bar, the Secretary of the Interior has determined the acreage that shall be reclaimed by the Company's irrigation system. In defiance of this determination and of the statute just quoted, the lower courts seek to detach the water rights from a portion of the patented lands, and to reapportion the water supply, on their construction of contractual relations between the Company and the purchasers of water rights. As a result, part of the lands patented to the State on the theory that the State has reclaimed them are left without water, and, therefore, must remain desert lands. If the decision of the lower courts is upheld, the administration of these Carey Act lands is taken from the Land Department and vested in the courts; and the Company and its bondholders are left without the means of reimbursement for work performed in accordance with a plan approved both by the State and Federal officials.

The effect of the decision is more far-reaching even than the present project. Several of the desert land States have constitutional provisions limiting their indebtedness, that prevent them from constructing irriga-

tion works. In order to reclaim the desert lands within their borders, these States must contract with construction companies. If, however, companies that have constructed irrigation works according to approved plans, and that prior to beginning construction work, have acquired permits for an approved appropriation of water, are to be prevented by judicial proceedings from obtaining reimbursement for their expenditures, capital in future cannot be induced to build irrigation works and the reclamation of the desert lands will be impeded, if not prevented.

**(5) The Circuit Court of Appeals has rendered conflicting decisions.**

The decision in the case at bar conflicts with other decisions of this same Circuit Court of Appeals. In somewhat similar cases, it has recognized the conclusiveness of the determination made by the land officials. In *Twin Falls, etc., Co.* v. *Caldwell*, 272 Fed., 356, the opinion of the Circuit Court of Appeals was delivered by the same judge who spoke for it here. There certain entrymen on Carey Act lands, alleging the insufficiency of the water supply, asked that a receiver be appointed to take possession of the irrigation system; that the area of the project be reduced to a point that the water supply would be sufficient to reclaim; and that water rights for lands outside of the reduced area be cancelled. At the time that suit was instituted, patent had not been issued by the Secretary of the Interior. Subsequently a stipulation was filed in the suit, showing that the Secretary of the Interior had issued patent for only a portion of the lands originally segregated and had declined to patent the remainder of the lands in the project. The court held that the controversy before it "could not be solved upon the issues contained in the pleadings." The decree of the District Court was reversed and the cause remanded for further proceedings, in accordance with

its opinion. That opinion contained the following language (p. 365):

> "Whether the water available for the irrigation of the lands in this project is ample for that purpose as required by the Carey Act is, as was stated in the former opinion of this court in this case and in the more recent case of *Twin Falls Salmon River Land & Water Co.* v. *Davis* (C. C. A.) 267 Fed. 382, a question of fact for the exclusive determination of the officers of the Land Department."

And again the court said (p. 367):

> "A stipulation just filed by the parties to this appeal sets forth that a patent has now been issued and delivered by the United States to the state of Idaho for approximately 35,000 acres of land in this project. This action on the part of the federal government establishes the fact that the Secretary of the Interior has determined in effect that an ample supply of water has been provided for the irrigation of 35,000 acres of irrigable land within the project. *We must accept that finding as conclusive.*" (Italics ours.)

In the same case on a prior appeal (242 Fed., 177, 193), the Secretary of the Interior had approved the plan of irrigation and had segregated certain desert lands, but had not patented them. The Circuit Court of Appeals disagreed with the decision of the District Court that, whether or not the State actually furnished an ample supply of water, this preliminary approval of the Secretary of the Interior was a conclusive determination that the State was entitled to patent for the land. The Circuit Court of Appeals held, however, that the adequacy of the water supply was a question of fact to be determined by the Secretary of the Interior when he issued patent, saying:

> "It is obvious that whether or not such a supply is actually furnished is a pure question of fact; and that all questions of fact in relation to all of the public lands are matters for the exclusive determination of the officers of the Land Department has been so many times decided by the Supreme and other federal courts as to render the citation of cases unnecessary. To what extent the Secretary of the Interior will, in determining the facts, take into consideration the approval of the plan by himself as well as by the state officials, and his order segregating the tract applied for from the public domain, will be for him to consider and determine."

*Twin Falls, etc., Co.* v. *Davis*, 267 Fed., 382, 389 (C. C. A.), was a case which involved the same project as the previous case. The construction company sought to prevent the State from relinquishing a portion of the segregated acreage so as to reduce the project to 35,000 acres. This relinquishment was prior to patent. The court upheld the right of the State to make the relinquishment but said, however, that the issue of patent would be a conclusive determination of the fact of the adequacy of the water supply. A portion of the opinion is as follows:

> "But what authority is to decide whether or not the lands have been reclaimed? Clearly determination of the question is one of fact intrusted under the law to the General Land Office, and not to the courts. In *Twin Falls Salmon River Land & Water Co.* v. *Caldwell*, 242 Fed. 193, 155 C. C. A. 17, the point was involved, and we held that whether or not there was a supply of water such as is required by the statute is a pure question of fact, and one for the exclusive determination by the Land Department. To that opinion we now adhere; hence it must follow that if there has been a decision to the effect that there has been no reclamation, the courts will not interfere, and cannot hold that a lien exists. *Gaines* v. *Thompson*, 7 Wall., 347, 19 L. Ed., 62."

The Circuit Court of Appeals for the Eighth Circuit has also rendered a decision, that conflicts in principle with the case at bar.

See *McKinney* v. *Development Co.*, 167 Fed., 770.

**(6) The District Court's opinion.**

On the subject of the conclusiveness of the Secretary's findings, the District Court said:

> "To the contention that the plaintiffs are concluded by the patent proceedings in the General Land Office, it is sufficient to respond that they were not parties to the proceedings, and are not bound thereby. They hold contracts imposing upon them heavy obligations, and in turn conferring upon them valuable rights. It would be shocking to hold that these rights could be taken away or substantially impaired by a finding of fact or conclusion of law (we are not advised which) made by an administrative officer in an ex parte proceeding in which they did not have an opportunity to be heard" (R., 145).

The appellees, however, had not only constructive, but must have had actual, notice of these proceedings in the General Land Office. Notice was published for nine weeks in the Richfield Recorder, that the State had applied for patent for the lands in question (R., 444); and this notice was also posted for thirty days of the same period in the United States Land Office at Hailey, Idaho (R., 445). Protests and contests were invited (R., 444). Before the Secretary made his determination and issued patent, the appellees were, therefore, afforded ample opportunity to contest the adequacy of the water supply.

The appellees (other than the State) had purchased their lands from the State (R., 16), and, therefore, could occupy no better position in regard thereto than their

grantor. The State had represented to the Federal Government that the water supply was ample to reclaim these lands (R., 445-6, 452), and had received a patent only after the Secretary of the Interior had determined that the State's representation was true. Moreover, the contracts between the Company and the individual appellees, by means of which the latter acquired their water rights, were a part of the plan for the irrigation of the lands in question. These contracts, we shall hereafter see, were subject to the terms of the Carey Act as amended; and that Act provided that the Secretary of the Interior should determine the adequacy of the water supply.

The "heavy obligations" imposed on the appellees by their contracts for the purchase of water rights only compelled them to pay a *pro rata* portion of the cost of constructing and maintaining the irrigation works. The deeds for their lands were not—indeed could not—have been received by them until after the Secretary's determination of the adequacy of the water supply; for the entire acreage in question was patented to the State (R., 440). If the individual appellees acquired any interest in these lands prior to patent, it was still expressly subject to the terms of the Carey Act, as amended. The contract between the United States and the State provided:

> "that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress and to the terms of this contract * * *" (R., 39).

The appellees not only took with actual or constructive notice of the Secretary's determination, but their contracts with the Company contained the following provision:

> "1. This agreement is made in accordance with the provisions of said contract between the

> State of Idaho and the company, which contract as amended, together with the laws of the State of Idaho, under which this agreement is made, shall be regarded as defining the rights of the respective parties, and regulates the provisions of the shares of stock of the Big Wood River Reservoir and Canal Company, Limited" (R., 90).

The contracts between the State and the Company specifically recited the Carey Act and its amendments and also the contract between the United States and the State (R., 43-4), and provided that the purchaser of water rights was entitled "to a proportionate interest only" in the water supply, "the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system" (R., 51).

The determination of the Secretary of the Interior neither took away nor impaired, as stated by the trial Judge, any of the appellees' rights. Any rights that the appellees had were subordinated to, or rather predicated upon, that determination. The appellees could be entitled to no more than a *pro rata* interest in the water supply. Any contract with the Company which purported to entitle them to more would, as we have seen, be void; for it would have left a portion of the lands with no water at all and would thus have defeated the purpose of the Congress, as set forth in the Carey Act, namely, the reclamation of the patented lands.

The appellees suggested below that the Secretary's determination was not final, because there had been no contest before him as to the adequacy of the water supply. The record does not show whether or not there was a contest. At all events, the State, the grantor of the other appellees, took part in the hearing before the Secretary and represented that the water supply was adequate. Moreover, as was said by the Circuit Court of Appeals in *Conkling* v. *Mines Co.*, 230 Fed., 553, 559:

> "The proceeding in the Land Department is judicial in its character, in the nature of a proceeding in rem, and its judgment by default, where the proper notice of the application has been given, is as conclusive and impervious to collateral attack as its judgment after a contest. *Golden Reward Min. Co.* v. *Buxton Min. Co.* (C. C.), 79 Fed. 868; *New Dunderberg Min. Co.* v. *Old*, 79 Fed. 598, 25 C. C. A., 116."

See also:

> *Marquez* v. *Frisbie*, 101 U. S., 473;
> *Johnson* v. *Drew*, 171 U. S., 93;
> *Burfenning* v. *R. Co.*, 163 U. S., 321.

If, as stated by the District Court, the appellees were not parties to the patent proceedings, it was because they did not accept the published and posted invitation to come in and contest the adequacy of the water supply (R., 444). At all events the appellees had constructive, if not actual, notice of the proceedings. At least one of the appellees, the State, took part in them. All of the lands in question were patented to the State upon its representation that an ample supply of water had been furnished to reclaim them (R., 445-6, 452). The appellees (other than the State) hold their lands as assignees of the State, and, therefore, stand in no better position than their grantor. The appellees hold their water rights subject to the terms of the Carey Act, and that Act places the determination of the adequacy of the water supply in the hands of the Federal officials. It might be "shocking" to take away or impair the appellees' rights, but it certainly is not shocking to uphold the Secretary's decision. The appellees had no rights that were not subordinate to that decision. The confusion in the mind of the District Judge is shown by the statement in his opinion that he was not advised whether the Secretary's decision was a finding of fact or conclusion of law.

Had he realized that the decision was one of fact, he might have held it conclusive.

The decisions on this subject, both of the Federal and State courts, are in such hopeless conflict that it would serve no useful purpose to discuss them further.

## II.

**The water rights issued by the Company should be construed so as to make them accord with the Carey Act; and if construed as entitling holders thereof to more than a pro rata amount of the entire water supply, they conflict with the Act and are void as to the excess.**

In *Gibson* v. *Choteau*, 13 Wall., 92, 99, this Court said:

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

The Carey Act is, therefore, a law made in pursuance of the United States Constitution and is the "supreme Law of the Land" (Art. VI). Any State statute which conflicts with it, and much more any private contract that is contrary to it, is invalid.

The contracts with the purchasers of water rights should be so construed as to make them accord, if possible, with the Carey Act, as amended, and thus avoid invalidating them.

"For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

*Hobbs* v. *McLean*, 117 U. S., 567, 576;
*Delaware, etc., R. Co.* v. *Kutter*, 147 Fed., 51, 62 (C. C. A., certiorari denied, 203 U. S., 588);
*Cooper* v. *R. Co.*, 212 Fed., 533, 536;
*In re John B. Rose Co.*, 275 Fed., 409, 415 (C. C. A.);
*Border National Bank* v. *National Bank*, 282 Fed., 73, 78 (C. C. A.);
*American Sugar Refining Co.* v. *Grocery Co.*, 284 Fed., 835, 836 (C. C. A.);
*Lorillard* v. *Clyde*, 86 N. Y., 384, 387;
*People ex rel. R. Co.* v. *Walsh*, 211 N. Y., 90, 100.

*In re John B. Rose Co., supra*, the Circuit Court of Appeals of the Second Circuit said:

"We are bound if possible so to construe the contract as to make it legal."

It is not only possible to construe the contracts of the Company with the purchasers of water rights as being in harmony with the Carey Act, as amended; but this is the fair construction to be placed upon them. As we have heretofore seen, if these contracts are construed as entitling the holder to more than a *pro rata* share of the water supply, some of the patented lands will be left without water and must remain desert lands. The Secretary of the Interior has determined the number of acres that can be reclaimed from the water supply. This determination involved the ascertainment of the amount of water necessary for each acre, the so-called "duty of

water." If the Company can by contract reapportion the water supply, the administration of these desert lands is taken out of the hands of the Federal officials, and the Company becomes the final arbiter of the area that can be reclaimed. Any contract by the Company that contravened the Carey Act or that was contrary to the policy of that statute would be invalid.

In *McKinney* v. *Development Co.*, 167 Fed., 770, 777 (C. C. A.), a construction company had contracted with the plaintiff that he should have the exclusive right to sell its water rights at not less than $19 nor more than $30 per acre, in his discretion. He sought to enjoin the company from making contracts for the sale of water rights that he had not negotiated. The court held that the contract violated the statutory provision requiring the price of the water rights to be just and reasonable and also prevented the construction company from performing its duty of contracting with settlers. A decree sustaining a demurrer was affirmed, the court saying:

> "The assertion of such a right flies in the face of a fundamental principle of law, that, where a grant of power under a statute is given for the accomplishment of the state's policy, the due performance of the function by the grantee is the consideration for the public grant; and consequently any contract by the grantee which tends to disable it from performing its entire function by undertaking to transfer to others the discharge thereof, with an effect, different from the grant, is violative of the contract with the state and contrary to public policy."

In *Adams* v. *Twin Falls Oakley Land & Water Co.*, 29 Idaho, 357 (161 Pac., 322, 327), there was a provision in the contract between the construction company and the settler whereby the company had the right to de-

prive the settler of the use of water for his land, on his failure to pay either the principal or interest of the water contract. The plaintiff had paid the current assessments but was in arrears on the original contract debt. He nevertheless applied for a writ of mandate to compel the company to deliver water to his lands. The writ was issued, on the ground that the contract provision was unenforceable since it contravened the statute and also the policy of the State. A portion of the opinion is as follows:

> "The deprivation of the settler's right to the use of the water by reason of his failure to make payments under the terms of his contract with the construction company upon the initial indebtedness, together with interest thereon, might frustrate the purposes of the Carey Act and the legislation of this state, and result in decreasing the security of the construction company under its contract.
>
> Thus, if we sustain the provisions of paragraph 6 of the contract, and thereby empower the construction company, through the operating company, to deprive the settler of the right to the use of the waters on his failure to make payments on the original contract debt, it might prevent the settler from making proof which would entitle him to a deed, and the state from procuring patent to the lands within the project. This would destroy the security the construction company has out of which it is to be reimbursed for the initial cost of construction with reasonable profit, and render valueless the construction company's lien upon the land. It would also result in the public waters of the state not being applied to the highest beneficial use at all times and under all circumstances, which is contrary to the policy of this state as declared by the Constitution and laws, as well as the decisions of the courts.
>
> We think it is safe to say that it has always been the policy of this state that no interruption

other than that expressly provided for by statute may be interposed to defeat the highest possible use of the public waters of the state."

The construction of the terms of the contracts between the Company and purchasers of water rights involves a consideration of the Carey Act and of the prior contracts between the United States and the State and also between the State and the Company.

The Carey Act, as amended, provides for the patenting of desert lands to the State when an ample supply of water is actually furnished for their reclamation. The Secretary of the Interior is made the judge of the adequacy of the water supply and of the acreage to be patented. The State is "authorized to make all necessary contracts to cause the said lands to be reclaimed," but is not authorized "to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement."

The forms of the various contracts which we shall now discuss are prescribed by the regulations of the United States and the State Land Departments. Of the former, the Court has always taken judicial notice.

*Caha* v. *U. S.*, 152 U. S., 211, 221;
*Colyer* v. *Skeffington*, 265 Fed., 17, 28;
*Santa Fe, etc., R. Co.* v. *Payne*, 267 Fed., 653, 654;
*Sprinkle* v. *United States*, 141 Fed., 811, 819.

The principles stated in the foregoing cases are equally applicable to the State regulations.

(1) *The contracts between the United States and the State.*

These contracts recite the Carey Act and its amendments; that the State has filed a map of the lands, and "exhibited a plan showing the mode by which it is pro-

posed that said lands shall be irrigated and reclaimed and the source of the water to be used for that purpose." The United States agrees to patent the lands to the State, whenever an ample supply of water is actually furnished to reclaim the same "in accordance with the provisions of said acts of Congress and with the regulations issued thereunder, and with the terms of this contract." The contract further provides (R., 39):

> "that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, *will take the same subject to all the requirements of said acts of Congress and to the terms of this contract,* and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands. (Italics ours.)

The State is authorized to enact such laws and to make such agreements as may be necessary to "cause such irrigation and reclamation" of the lands "as is required by this contract and the said acts of Congress" (R., 39). The State is authorized to make proof that an ample supply of water has been furnished to reclaim a particular tract or tracts of said lands; and as soon as such proof shall have been examined and found to be satisfactory, patent shall issue to the State. The contract is made on behalf of the United States by the Secretary of the Interior and is approved by the President (R., 37-42).

*By these contracts, the State and its grantees take title to the patented lands subject to the requirements of the Carey Act as amended. They are bound by the determination of the Secretary of the Interior as to the adequacy of the water supply.* The State is authorized to enact such laws and to make such agreements as may be necessary to "cause such irrigation and reclamation" of the lands as is required by "the said acts of Congress." Any contract between the State and the Com-

pany that required an apportionment of the water supply different from that approved by the Secretary of the Interior would, therefore, be unauthorized.

(2) *The contracts between the State and the Company.*

These contracts recite that the Company has filed proposals with the State for the construction of irrigation works under the provisions of the Carey Act and its amendments and the laws enacted by the State "in pursuance of the power granted by the said Acts of Congress," and that certain lands have been segregated in accordance with contracts between the United States and the State (R., 43-4). The Company agrees to construct the irrigation works (R., 44). The general outline and specifications of the irrigation system are set forth.

> "The main canals of this system shall have a carrying capacity when completed sufficient to deliver simultaneously one second foot of water for every eighty acres of land described in this contract, together with all other lands susceptible of irrigation from said canals, as near as the same can be estimated and agreed upon between the State Engineer and the engineers of" the Company (R., 47-8).

It will be noted that the clause just quoted provides for the "carrying capacity" of the canals and not for the amount of water to be delivered. The water that the Company is authorized to divert is then set forth as being 6,000 cubic feet per second of time, and the permits of the State Engineer by which the diversion is authorized are specifically mentioned (R., 70). This is followed by an agreement on the part of the Company

> "to furnish and deliver to the owners of shares in said reservoir and irrigation system, *as specified in the other provisions of this contract,* all of said appropriated waters to which" (italics ours)

the Company "may be entitled, to the extent of one-eightieth (1/80) of one (1) cubic foot per second of time per acre, said water to be furnished for the reclamation of the lands included in said segregations, * * * together with any other lands not included in said segregations, but which are so situated as to be susceptible of irrigation and reclamation from the canal and distributing system designed for the irrigation of the lands included in the aforesaid lists" (R., 49). The foregoing provisions show the maximum amount of water that the Company must deliver. They require the Company to deliver "as specified in the other provisions of this contract, all of said appropriated waters." Later provisions entitle the purchaser "to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract to be irrigated from the system."

When the construction work was so far completed as to insure that the said water would be furnished to the segregated lands, the State Board of Land Commissioners were authorized in their discretion to cause the lands to be opened for settlement. The State agreed not to approve any application for or filing on the lands until the person applying furnished a copy of a contract entered into with the Company for the purchase of sufficient shares or water rights for the irrigation of the lands. The Company agreed (R., 50-1)

> "that to the extent of the capacity of the irrigation works and to the extent of its water rights, it will, as rapidly as lands are opened for entry and settlement, sell, or contract to sell water rights or shares for land to be filed upon to qualified entrymen or purchasers without preference or partiality other than that based upon priority of application; it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal as against

> subsequent purchasers, *but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system.*" (Italics ours.)

The amount and manner of payment for the lands and also for the water rights were specified. The Company agreed to sell a water right or share for each and every acre filed upon or purchased from the State or acquired from the United States (R., 52, 74).

> "Each of said shares or water rights shall represent a *carrying capacity in said canal* sufficient to deliver water at the rate of one-eightieth (1/80) of one (1) second foot per acre per second of time, and each share or water right sold or contracted, as herein provided, shall also represent a proportionate interest in said reservoir and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said reservoir and irrigation works. Said irrigation system, however, to be built in accordance with the plans heretofore filed with the Board, which irrigation system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned." (Italics ours; R., 52, 74.)

The amount and terms of payment are specifically set forth. No payments other than the initial payments are required to be made "until the water for the said land is available from said reservoirs and canals * * * and such water must be available at the beginning of the irrigating season in order to make such payments become due" (R., 53, 75).

> "But in no case shall water rights or shares be dedicated to any of the lands aforementioned or

> sold beyond the carrying capacity of the said canal system or in excess of the appropriation of water as hereinbefore mentioned" (R., 54, 76).

In considering the language just quoted it must be remembered that these contracts were subject to the requirements of the Carey Act and its amendments; and that the acreage which the carrying capacity of the canals and the appropriation of water are sufficient to reclaim has been determined by the Secretary of the Interior, pursuant to the terms of those statutes.

The transfer of possession of the canal to, and its management by, the Canal Company is provided for.

> "At the time of the purchase of any water rights there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon" (R., 55, 77).

The Company is entitled to hold such stock as security for the payment of the purchased price therefor (R., 55, 77). The certificates of stock in the Canal Company "shall be made to indicate and define the interest thereby represented in the said system, to wit: a water right of one-eightieth (1/80) of a cubic foot per second for each acre and a proportionate interest in said reservoir and irrigation system and shares, based upon the number of shares ultimately sold therein" (R., 57, 79). Water is to be made available

> "in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation, as will best protect and serve the interests of all the users of water from said irrigation system" (R., 57, 79).

While the Company retains the management of the Canal Company, the former shall devise the system of rotation, subject to the approval of the State Engineer (R., 57, 79).

> "The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system" (R., 58, 80).

The Company agrees to complete the system and to supply the water to the segregated lands before a specified date, "at which last mentioned date the obligation to furnish the full-one eightieth (1/80) of one (1) cubic foot per second of time of water per acre shall be in force and effect" (R., 60, 82).

These provisions show that the holder of a water right was not entitled to a continuous flow of 1/80 of a cubic foot of water per second per acre at all times, or to any definite amount of water. His was a proportionate interest in the entire supply, limited to the flow above named. That flow represented the capacity of the canal system. Apart from these contracts being subject to the requirements of the Carey Act and its amendments and to the terms of the contract between the United States and the State, the holders of water rights were entitled to water from the canals only during the irrigation season, and only "in such quantities and at such times as the condition of the crops and weather may determine." That the Company was not obligated to deliver a continuous flow of the amount named is further shown by its being authorized, subject to the approval of the State Engineer, to devise a system of irrigation by rotation. The Company was not obligated to deliver a definite amount of water, but only to apportion the

water supply. The Company must deliver the "water to the irrigators in turn and by rotation, as will best protect and serve the interests of all the users of water from said irrigation system."

The estimated cost of the irrigation works is set forth, and the lands covered by the contract are described as the lands donated by the Congress to the State under and pursuant to the Carey Act and its amendments. The Canal Company is forbidden to permit the use of water from the irrigation system by persons who have not purchased water rights (R., 42-86).

(3) *The contracts between the Company and the settlers.*

These contracts recite the prior contracts between the Company and the State and that those contracts are of record in the office of the Register of the State Land Board; that the Company has the right to divert water under specified permits of the State Engineer; that the Board has notified the Company that it may proceed to sell water rights "pursuant to law and the terms of said contract with the State"; and continue as follows:

> "That the purchaser has made application to the company to be permitted to purchase upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed, to the extent hereinafter named" (R., 88).

They further recite that the purchaser purchases a certificate of the Canal Company's stock, the form of which is set forth, and which states that it "entitles the owner thereof to receive one-eightieth of a cubic foot of water per second of time for the irrigation of and domestic uses on" specified lands; also to a proportionate interest in the irrigation works, "based upon the number of shares finally sold, in accordance with the contract be-

tween the" Company and the State (R., 88-9). The parties then expressly agree as follows:

> "1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and the company, which contract as amended, together with the laws of the State of Idaho, under which this agreement is made, shall be regarded as defining the rights of the respective parties, and regulates the provisions of the shares of stock of the Big Wood River Reservoir & Canal Company, Limited" (R., 90).

The Company agrees to maintain the irrigation system. The cost of operating the system is provided for, as well as the purchase price to be paid for the stock, and the method of securing the same. The purchaser agrees to have a specified amount of land in cultivation each year and the contract further provides as follows:

> "The contract is made pursuant to and subject to the contracts, as amended, between the company and the State of Idaho, and the existing laws of said State, and is to be construed in conjunction with said contract and said laws" (R., 96).

The water right contracts are expressly "made pursuant to and subject to the contracts, as amended, between the company and the State." The latter contracts are expressly subject to the terms of the Carey Act and its amendments. Thus the water right contracts are by reference made subject to these statutes. As we have seen, the contracts between the United States and the State provide that all persons acquiring title to the patented lands "will take the same subject to all the requirements of said Acts of Congress and to the terms of this contract" (R., 39). But without this, as the water right contracts are a part of the plan for the reclamation of Carey Act lands, they must necessarily be subject to the terms of the statutes in question. All the contracts taken together show that the holders of water

rights were entitled only to a proportionate interest in the water supply up to their needs (see R., 50-1). The provision for 1/80 of a cubic foot per second per acre refers to the rate of flow that the land owner should receive, while water was being delivered to him. The contract should not be construed as requiring the delivery of a definite amount of water, on the theory that a continuous flow of 1/80 of a cubic foot per second per acre must at all times, or during the irrigation season, be furnished each land owner. If so construed the contracts are invalid; for, as we have seen, they would conflict with the policy of the Government officials in administering these desert lands.

Ignoring the foregoing considerations and also ignoring the fact that water was to be furnished by rotation and only "in such quantities and at such times as the condition of the crops and weather may determine," the Circuit Court of Appeals held that the Company was bound by its contracts to deliver to the settlers a continuous flow of one-eightieth (1/80) of a cubic foot per second per acre during the irrigation season (R., 669, 674).

In *State* v. *Twin Falls, etc., Co.*, 21 Idaho, 410 (121 Pac., 1039, 1050), with reference to a Carey Act water right contract, the court said that

> "under the provisions of said contract, each landowner owns a proportionate part of said irrigation system and said water, and in times of shortage he is only entitled to receive his proportionate share of the water."

In *Twin Falls, etc., Co.* v. *Caldwell*, 242 Fed., 177, 190, the Circuit Court of Appeals said:

> "The construction of the system necessarily required the furnishing from some source of the money with which to do the work; the compensation to the construction company for the liability assumed by it in procuring the required money

> and in doing the work must of necessity come from the sale of the lands and of rights to the appropriated water; and of that fact both Congress and the state were, of course, well aware, as is shown by the legislation that has been referred to. In the execution of the project the contract between the state and the construction company, and the contract between that company and the settlers, were made. Manifestly, they are to be read together and in connection with the statutes of Congress and of the state, to which the contracts expressly referred."

The land owners naturally desire as much water as they can obtain. It is to their interest to obtain an excessive amount of water. If by using twice as much water, they can slightly increase the yield of their land, they would naturally like to do so. The Secretary of the Interior, on the other hand, looks to the benefit to accrue to the tract as a whole. He seeks to benefit the greatest number, rather than the greatest benefit to a smaller number. He desires the reclamation of the largest acreage, not the maximum agricultural development of a smaller area.

The construction given these contracts by the lower courts not only conflicts with the administration of the patented lands by the Federal officials, but works gross injustice to the Company and its bondholders. It has constructed the irrigation works in accordance with the plan approved by the Federal and State officials, who also approved the water supply. By the final decree herein, the Company is left without the means of obtaining reimbursement for a large part of its expenditures.

In *Idaho Irrigation Co.* v. *Lincoln County*, 28 Idaho, 98 (152 Pac., 1058, 1061), the court said:

> "The only means of remunerating the construction company is by the sale of the water rights. The state land board fixes the price per acre to be charged for such water rights by dividing the cost

of reclaiming the land by the number of acres to be reclaimed, and when all of the water rights connected with such system have been disposed of, the construction company has, at least in theory, been reimbursed for its outlay, provided that purchasers of such water rights pay the purchase price for them. The water rights unsold cannot be considered in the ordinary sense as assets of the construction company, since water rights remaining unsold represent rather a liability of the construction company which can only be met by the sale of the water rights as provided by law."

## III.

**Neither the State nor its Commissioner of Reclamation can reapportion the water supply to a smaller acreage than the Secretary of the Interior has determined that it was ample to irrigate.**

The project in question was completed and a patent issued to the State for the entire 117,677.24 acres (R., 440) in the year 1915 (R., 443). After this suit had been begun and on June 2, 1919, the Commissioner of Reclamation made an order that the State intervene as a party plaintiff herein (R., 133-4). He also made an order filed February 9, 1920 (R., 136), by which he purported to forbid the Company "from making any further or additional sales of water rights or of shares of stock representing or evidencing water rights, or entering into any further contract or contracts for the sale of water rights for lands to be watered from the system of irrigation works of the" Company (R., 135). It will be recalled that the State, through its Engineer, had represented to the Federal officials, at the time the State applied for patent, that an ample supply of water had been actually furnished thoroughly to irrigate and reclaim the lands

applied for (R., 452); and that the Governor had certified that the laws of the State had been complied with in all respects (R., 451). There was no law in existence at the time the lands in question were patented authorizing the State Board of Land Commissioners, or its successor, the Commissioner of Reclamation, to limit the area for which water rights might be sold. Had there been any such statute, as we have seen, it would have been contrary to the Carey Act and its amendments, and would, therefore, have been invalid; for it would have been an attempt to transfer the administration of the desert lands from the Federal to the State officials.

The acceptance of the grant of the lands on the terms set forth in the Carey Act, and its amendments, prevents the State from making a reapportionment of the water supply that would conflict with the decision of the Secretary of the Interior.

In their brief in the court below, appellees' counsel asserted that the Commissioner of Reclamation prohibited the Company from making further sales of water rights, by virtue of the authority vested in him by Section 3004 of Idaho Comp. Stat. of 1919. The statutory provision in question did not become law, however, until March 17, 1919. (See Laws 1919, Ch. 70.) It was enacted four years after the lands had been patented. It could not have authorized the Commissioner of Reclamation to make any such prohibition, not only for the reasons stated, but also because it would have impaired the obligation of the contracts between the Company and the State.

*Evans* v. *Swendsen*, 34 Idaho, 290 (200 Pac., 136, 137), is a case that aptly illustrates the lack of power on the part of the State officials to redetermine the adequacy of the water supply, and to refuse to sell any additional land, if they are of opinion that the water supply is inadequate. There the plaintiff applied for a writ of mandate against the Commissioner of Reclamation to compel

him to accept the plaintiff's filing upon a tract of land. Notice had been given that the land was thrown open for entry, but this notice the Board of Land Commissioners subsequently sought to cancel on the ground that the water supply was insufficient. The court gave judgment for the plaintiff, saying:

> "The facts stated in the answer with reference to the failure of an adequate water supply for the land in question, which by the demurrer are admitted to be true, are not sufficient to vest authority in the Board of Land Commissioners to cancel its notice and withdraw the land from entry where such authority is not granted by statute."

See also

*Furbee* v. *Alexander*, 31 Idaho, 738 (176 Pac., 97, 98).

## IV.

**The plaintiffs are not entitled to equitable relief, because they neither have clean hands nor offer to do equity.**

As we have seen, the State accepted the conditions of the Carey Act and vested the management of lands patented to it thereunder in the State Board of Land Commissioners (Idaho Rev. Codes, Sec. 1613; C. S.,* Sec. 2996). Any person desiring to construct irrigation works was required to file with the Board a request for the selection of the lands to be reclaimed, accompanied by a proposal to build the works. The proposal must, in turn, be accompanied by the State Engineer's report

*The reference is to Idaho Compiled Statutes of 1919.

thereon (Idaho Rev. Codes, Sec. 1615; C. S., Sec. 2998). The State Engineer's report must state, among other things

> "whether or not the proposed works are feasible; whether the proposed diversion of the public waters of the State will prove beneficial to the public interest; *whether there is sufficient unappropriated water in the source of supply;* and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; * * *." (Italics ours.)
>
> Idaho Rev. Codes, Sec. 1618; C. S., 3001.

If necessary in order to enable him to make his report, the State Engineer is required to make "such survey or examination as will enable him to report intelligently thereon to the board" (Idaho Rev. Codes, Sec. 1618). The Board is forbidden to approve any request on which the State Engineer has reported adversely (Idaho Rev. Codes, Sec. 1619; C. S., Sec. 3002).

When the irrigation works "shall be so far completed as to actually furnish an ample supply of water" to reclaim the lands, the State shall, through the Board, "make proof of such fact and shall apply for a patent to such lands * * * " (Idaho Rev. Codes, Sec. 1628; C. S., Sec. 3014).

The regulations of the United States Land Office provide that before the application of any State for the segregation of lands is allowed, the State must file a map of the lands and exhibit a plan "showing the mode of contemplated irrigation and the source of the water." The regulations then continue as follows:

> "In accordance with the requirements of the act, the State must give full data to show that the

> proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; *for which purpose a statement by the state engineer of the amount of water available for the plan of irrigation will be necessary.* The other data required cannot be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted." (Italics ours.)

It is thus apparent that, prior to the Company's beginning construction, the capacity of the proposed irrigation works and the sufficiency of the water supply were approved by the State; and in reliance on that approval the Company has expended large sums. Notwithstanding its approval of the water supply as "sufficient," the State now attacks the correctness of that finding and seeks to enjoin the Company from obtaining reimbursement for its outlay. The State, however, makes no offer to reimburse the Company or its bondholders for any portion of these expenditures.

After the irrigation works were completed and subjected to the test of practical performance, the State made proof to the Secretary of the Interior that "an ample supply of water" to reclaim the lands had been actually furnished (R., 452). On the strength of this proof, it received from the United States a patent for the 117,000 odd acres for the reclamation of which it proved, and the Secretary of the Interior determined, an ample supply of water had been furnished. The consideration for the patent of these lands to the State was the supply by it or its contractor of an ample amount of water to reclaim them.

> "The primary purpose of the Carey Act was, not to enable the government to divest itself of title to its desert lands, but to secure their irri-

> gation and reclamation; *reclamation is the only consideration for the donation or grant*, and is a condition precedent to the exercise of the power to grant." (Italics ours.)
>
> *Twin Falls, etc., Co.* v. *Alexander*, 260 Fed., 270, 274.

By accepting the grant of the lands in question on the terms set forth in the Carey Act, and its amendments, the State agreed to those terms. It agreed that the water it had caused to be furnished for the reclamation of the lands should be apportioned in accordance with the determination of the Secretary of the Interior.

The State, although making no offer to surrender any part of these 117,677.24 acres, seeks to set up a failure of the consideration upon which it has obtained them. It will be remembered that the Company had sold, at the time this suit was commenced, 88,835.71 water rights, of which 12,722.64 were held by the trustees, leaving 76,113.07 in other hands; but of the 76,113.07 there had been traded for prior water rights 12,045.80, so that under the decree of the District Court, the Company would have obtained reimbursement for the construction work done by it through the sale of only 64,067.27 water rights and will be prevented from selling any more. The decree of the Circuit Court of Appeals permits the sale of 5,322.26 additional rights. The Company's contract with the State, however, authorized the sale of 150,000. In other words, the allegations of the State in this proceeding as to the inadequacy of the water supply, if true, show that the State has obtained a large part of the patented lands upon representations which it now asserts were false. Moreover, the Company has expended large sums of money in constructing works approved by the State. But for the State's approval of the works and of the sufficiency of the water

supply, the construction work would not—indeed, could not legally—have been done. The State offers neither to do equity nor has it clean hands.

The other appellees have acquired a portion of the patented lands from the State and stand in no better position than their grantor. Furthermore, their contracts for water rights are subject to the terms of the Carey Act as amended, and those Acts required the State to submit proof that an ample supply of water to reclaim the lands had been furnished.

Under such circumstances, the appellees are not entitled to the aid of a court of equity, and it was error for the lower courts to grant them any relief.

> *Brown* v. *Iron Co.*, 134 U. S., 530;
> *Manhattan Medicine Co.* v. *Wood*, 108 U. S., 218.

The equitable maxims above referred to are applicable to the State and it is not entitled to the aid of a court of equity.

> *United States* v. *Board of Commissioners, etc.*, 254 Fed., 570 (C. C. A.);
> *United States* v. *Debell*, 227 Fed., 771 (C. C. A.);
> *Iowa* v. *Carr*, 191 Fed., 257 (C. C. A.);
> *United States* v. *Lumber Co.*, 131 Fed., 668 (C. C. A.);
> *United States* v. *Stinson*, 125 Fed., 907 (C. C. A.);
> *Michigan* v. *R. Co.*, 69 Fed., 116 (C. C. A.).
> See also 39 Cyc., 773-4.

In *Iowa* v. *Carr*, 191 Fed., 257, 266, the Circuit Court of Appeals in holding a State estopped to claim title to certain public land on which it had allowed the defen-

dants to pay taxes for many years, said, citing many authorities:

> "* * * when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.
>
> "The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances."

The appellees, other than the State, are its assignees. They, therefore, occupy no better position than their assignor, and are not entitled to the aid of a court of equity.

*Harms* v. *Stern*, 231 Fed., 645 (C. C. A.);
*Ridge* v. *Healy*, 251 Fed., 798 (C. C. A.);
*Hodge* v. *Sloan*, 107 N. Y., 244;
*Smith* v. *Emery*, 106 Maine, 258 (76 Atl., 686);
*Stowell* v. *Tucker*, 7 Idaho, 312 (62 Pac., 1033, 1034);
*Lewis* v. *Holdredge*, 56 Nebr., 379 (76 N. W., 890, 891);
*Wilson* v. *Pannell*, 149 Ark., 81 (232 S. W., 32);
*Chapman* v. *Hicks*, 41 Calif. App., 158 (182 Pac., 336, 339);
*Burns* v. *Hiatt*, 149 Cal., 617 (87 Pac., 196);
*Tracy* v. *Wheeler*, 15 N. D., 248 (107 N. W., 68);
*Keller* v. *Souther*, 26 N. D., 358 (144 N. W., 671);
*Aveline* v. *Ridenbaugh*, 2 Idaho (Hasbr.), 168 (9 Pac., 601);

*Harton* v. *Lyons*, 97 Tenn., 180 (36 S. W., 851);
*Whitney* v. *R. Co.*, 11 Gray, 359, 364;
2 Pomeroy's Equity Jurisprudence (4th ed.), Secs. 688 and 689.

In *Harms* v. *Stern*, 231 Fed., 645, 648, one Romberg agreed with the defendant to assign to the latter all songs the former might write. Romberg later wrote a song and sold it to the plaintiffs, who apparently purchased for value and without notice. The plaintiffs copyrighted the song and brought suit to enjoin the defendant from publishing it. An order denying the injunction was affirmed, the Circuit Court of Appeals saying that as Romberg's hands were not clean, the plaintiffs standing in his shoes were equally tainted. A portion of the opinion is as follows:

> "In our opinion the plaintiffs do not come into this court with clean hands. Their misconduct relates to the matter now in litigation. Their right is the right of Romberg and the latter's misconduct is for the purposes of this suit theirs. Having agreed by a binding contract to assign this song to these defendants, he has not done as he agreed, but has repudiated the legal and moral obligation which the agreement imposed upon him. In doing so he has committed iniquity as respects this copyrighted song and the relation of these defendants thereto. And with his hands thus unclean he has no standing in a court of equity in asking an injunction to restrain these defendants from exercising a right which he bound himself to give exclusively to them. As the plaintiffs stand in his shoes we must decline to grant them what we could not grant to Romberg."

In *Stowell* v. *Tucker*, 7 Idaho, 312 (62 Pac., 1033, 1034), an irrigation company constructed a ditch over the lands of another, pursuant to an agreement that the

land owner should be entitled to a specified amount of water from the ditch. On the ground that the agreement was void because not in writing, the appellants, the purchasers of the ditch, subsequently sought an injunction restraining the then land owner from using water from the ditch. A judgment denying the injunction was affirmed. A portion of the opinion is as follows:

> "The predecessor in interest of the appellants received the full benefit that could accrue to it from the contract, even if said contract had been in writing, acknowledged, and recorded, and appellants now seek to evade the obligations of said contract by invoking an equitable remedy. The appellants ask equity, but refuse to do equity. The facts established by the record show that in a proper action the respondents would have been entitled to enforce specific performance of said oral contract under the provisions of section 6008, Rev. St. The appellants do not come with clean hands. Asking equity, but refusing to do equity, the judgment in this case, that appellants take nothing by this action, we regard as correct."

In *Lewis* v. *Holdredge*, 56 Neb., 379 (76 N. W., 890, 891), the court said:

> "The plaintiff in this case bases his action upon an unconscionable claim. He occupies no higher ground than his assignor."

Again the court said:

> " 'He who seeks equity must do equity,' and come into equity with clean hands."

The State's action has induced the Company to make expenditures of hundred of thousands of dollars. The State, now alleging that its action was ill-founded, asks an injunction that will restrain the Company from obtaining reimbursement for a large part of its expenditures. The State has also acquired thousands of acres

by the same action that furnished an inducement for the Company's expenditures. These lands the State retains, although alleging the falsity of the representations on which it obtained them. Where Carey Act lands have been entered upon and are subsequently eliminated from the segregation, the State has authorized repayment to the entrymen of the fees, commissions and purchase money paid by them (Idaho Laws 1921, c. 52, p. 83). No such consideration is, however, shown for a construction company. The State does not offer to indemnify the Company or its bondholders; or to give back to the United States the lands it obtained on proofs that it now asserts were false.

The State's action with respect to the patented lands is the basis of the rights of the other appellees. They obtained their lands from the State; and their contracts for water rights could have had no existence had the State not approved the adequacy of the water supply. A court of equity ought not to tolerate the appellees' position; for their rights result from the proof by the State of the adequacy of the water supply that they now attack.

An appellate court will consider whether or not a party seeking equity comes in with clean hands, even though that question was not raised in the lower court, for this doctrine is enforced not as a matter of defense, but as a matter of public policy.

*Jones* v. *Pettingill*, 245 Fed., 269 (C. C. A., certiorari denied, 245 U. S., 663);

*Primeau* v. *Granfield*, 193 Fed., 911 (C. C. A., certiorari denied, 225 U. S., 708);

*Ellis* v. *Frawley*, 165 Wis., 381 (161 N. W., 364);

*Massachusetts National Bank* v. *Shinn*, 163 N. Y., 360 (57 N. E., 611);

*Doucet* v. *Insurance Co.*, 180 N. Y. App. Div., 599;

*Crichfield* v. *Paving Co.*, 174 Ill., 466 (51 N. E., 552);
*Lewy* v. *Elevator Co.*, 218 Ill. App., 306;
*Kremer* v. *Earl*, 91 Cal., 112 (27 Pac., 735);
*Cullison* v. *Downing*, 42 Ore., 377 (71 Pac., 70);
*Heaton* v. *Dennis*, 103 Tenn., 155 (52 S. W., 175);
*Camp* v. *Bruce*, 96 Va., 521 (31 S. E., 901).

In *Primeau* v. *Granfield*, 193 Fed., 911, 913 (C. C. A., certiorari denied, 225 U. S., 708), the plaintiff bought a bill in equity, alleging that the defendant had, while acting as plaintiff's agent in making certain investments, deceived the plaintiff as to the value of the investments, and praying for an accounting. The lower court granted the relief prayed for. On appeal the defendant for the first time put forward the defense that the plaintiff's hands were unclean, the investments in question having been made in carrying out a plan to defraud innocent investors. The plaintiff contended that this defense was too late, but the Circuit Court of Appeals held that the defense of unclean hands could be raised for the first time on appeal, as it was a matter of public policy, and the decree of the lower court was reversed solely on the ground that the plaintiff's hands were unclean. A portion of the court's opinion is as follows:

> "But from the very nature of the fundamental principles involved it is manifest that the question is deeper than one of pleading. The court must consider it not because it is a matter of defense to the defendant but because it is against public policy to hear the case if the charge be established. The court acts for its own protection rather than for the protection of the defendant."

## V.

**Specific performance of a contract ought not to be awarded where the result will be contrary to public policy or inequitable.**

We have already shown that the contracts between the Company and the purchasers of water rights are contrary to the Carey Act as amended, when these contracts are given the construction applied to them by the lower courts. As so construed, they entitle existing holders of water rights to such a large amount of water that there is not enough to go around, and a large part of the patented acreage is left without water and must remain desert land. We have also shown that when properly construed these contracts entitle the holders of water rights to only a proportionate part of the entire water supply as apportioned by the Secretary of the Interior.

Let us assume, however, for the purpose of argument, that the water right contracts have been correctly construed by the lower courts, and that when so construed, they are valid. Even upon that assumption, specific performance of the contracts ought not to have been awarded, for a result would be reached that is contrary to public policy. The Congress intended reclamation of the desert public lands, and the consequent distribution of the water supply available for irrigation, to be left in the hands of the Federal officials. This is the well recognized policy of the Government.

*Roughton* v. *Knight,* 219 U. S., 537;
*Cosmos Exploration Co.* v. *Oil Co.,* 190 U. S., 301;
*Johanson* v. *Washington,* 190 U. S., 179;
*Kirwan* v. *Murphy,* 189 U. S., 35.

In *Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155, 167, this Court said:

> "It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

The decrees of the lower courts enforce their construction of these contracts by enjoining the sale of further water rights. This increases the amount of water that the existing owners of water rights will receive. It constitutes what is called negative specific performance of the contracts. It is a negative mode of requiring the Company to furnish each water right owner a larger amount of water than that to which he is entitled.

> 4 Pomeroy's Equity Jurisprudence (4th Ed.), Sec. 1341;
> *Joy* v. *St. Louis*, 138 U. S., 1, 46;
> *Shubert* v. *Woodward*, 167 Fed., 47 (C. C. A.);
> *Gen. Electric Co.* v. *Westinghouse, etc., Co.*, 144 Fed., 458;
> *Welty* v. *Jacobs*, 171 Ill., 624 (49 N. E., 723).

As the specific performance of the water right contracts awarded by the lower courts causes a result contrary to public policy, it was error.

> *Oscanyan* v. *Arms Co.*, 103 U. S., 261;
> *Barnsdall* v. *Owen*, 200 Fed., 519 (C. C. A.);

*McKinney* v. *Development Co.*, 167 Fed., 770 (C. C. A.);
*Casserleigh* v. *Wood*, 119 Fed., 308 (C. C. A.);
*Empire, etc., Co.* v. *Gas. Co.*, 289 Fed., 826;
*Logan* v. *Tel. Co.*, 157 Fed., 570;
*Ryan* v. *McLane*, 91 Md., 175 (46 Atl., 340);
*Prince* v. *Gosnell*, 19 Okl., 175 (92 Pac., 164);
*Kremer* v. *Earl*, 91 Cal., 112 (27 Pac., 735);
36 Cyc., 546.

Though a contract may be valid at law, equity will not grant specific performance where it is inequitable to do so.

*Willard* v. *Tayloe*, 8 Wall., 557;
*King* v. *Hamilton*, 4 Peters, 311;
*Wesley* v. *Eells*, 177 U. S., 370;
*Clark* v. *Milling Co.*, 176 Fed., 180 (C. C. A.);
*Marks* v. *Gates*, 154 Fed., 481 (C. C. A.);
*Koch* v. *Streuter*, 232 Ill., 594 (83 N. E., 1072);
*Ferguson* v. *Blackwell*, 8 Okl., 489 (58 Pac., 647);
5 Pomeroy's Equity Jurisprudence (4th ed.), Sec. 2209.

In *King* v. *Hamilton*, 4 Peters, 311, 328, the Court said:

> "Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a settled rule, therefore, to allow a defendant in a bill for a specific performance of a contract, to show that it is unreasonable or unconscientious, or founded in mistake, or other circumstances, leading satisfactorily to the conclusion, that granting the prayer of the bill would be inequitable and unjust."

And in *Willard* v. *Tayloe*, 8 Wall., 557, 567, the Court said:

> "In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law * * *."

The additional water which the decree appealed from will give the individual appellees is a small benefit in proportion to the enormous loss that the Company and its bondholders are caused by the prohibition against the further sale of water rights. And neither the Company nor its bondholders are guilty of any wrong. The irrigation system has been duly constructed according to the plan approved by the Federal and State officials. The permits to divert water that the Company owned were known and approved. Moreover, the water rights owned by the trustees are as much outstanding as those owned by the appellees, and yet the lower courts discriminate between them. This branch of the case will be more fully presented by the trustee's counsel.

The appellees' rights were subject to the Carey Act and its amendments. They knew the permits for the diversion of water that the Company owned. They knew that the Secretary of the Interior was authorized to determine the acreage over which this water should be apportioned. If we concede for the purpose of argument

that there was not enough water for the entire patented acreage, some one must suffer. Is it more equitable to make all the loss fall on the Company and its bondholders or to reduce somewhat the amount of water that the individual appellees shall receive? They equally with the Company invested in the project knowing the source of the water supply. They equally with the Company are bound by the Secretary's decision.

If the appellees are correct that there is not enough water for the land that has already been settled upon, they need no injunction for their protection. The irrigation system has been in operation for a number of years. The amount of water furnished by the Company to settlers is a matter of common notoriety in the adjacent community. If the supply of water were as inadequate as the appellees claim, there would be no market for the Company's water rights. No additional water rights could be sold. The appellees are, therefore, protected by economic laws, without the interposition of a court of equity.

## VI.

**The courts below erred in determining the amount of water available and the amount required for reclamation.**

On the trial the appellants contended that the water supply available to the Company was adequate for the patented area plus such additional lands as the Company was permitted to supply with water under its contract with the State. The area of such lands was, of course, limited by the topography of the country, as irrigation is by gravitation; and by the length of the canals, as water cannot be carried far beyond the canal

ends. The number of water rights that might be sold was also limited by the capitalization of the Canal Company, which was fixed at 150,000 shares by the Company's contract with the State (R., 77). Of the 88,835.71 water rights outstanding at the commencement of this suit but 7,682.71 had been sold to lands outside the patented area; 12,045.80 additional water rights were exchanged for prior decreed rights, sometimes referred to in the record as "old rights" (R., 305), thus reducing the holders of such rights to a parity with holders of water rights sold by the Company (Defendants' Exhibit 11).

It is obvious that at no time could the entire 117,000 acres in the patented area be in cultivation at once, however great the water supply might be. A certain area, such as the roads, homesites and land lying fallow, must necessarily require no water. A certain percentage of the acreage patented is covered with earth too shallow for cultivation, or lies too high to be irrigated by gravitation (R., 291, 307, 325, 326, 335, 358, 360). In 1919 the acreage in cultivation was 56,864 acres, and that was the greatest acreage ever requiring irrigation (R., 564). At that time there were 88,835.71 shares of water stock outstanding (R., 568-9). As one share was issued for each acre there was thus in cultivation only 63 per cent. of the acreage for which water rights had been sold. In prior years the percentage was smaller. It seems highly improbable that at any time there would be a greater acreage calling for irrigation than 90,000. Such an acreage would be 76 per cent. of the patented area; and the State officials in determining that the water supply was ample and the Secretary of the Interior in reaching his decision must have taken into consideration that a part of the area patented would never be irrigable, and that of the irrigable land not every acre would require irrigation in any one season.

At a duty of water of two acre feet, which, as will appear, the Company in its experiments found ample and which both its farmer witnesses and its experts testified they found ample, a water supply at the farmers' headgates of 180,000 acre feet would thus be adequate. At a duty of water of 2¾ acre feet—that found by the trial court—225,000 acre feet would be adequate. That is just the supply which counsel for the appellees stated the Company had available (R., 238).

The area represented by the shares outstanding at the commencement of suit was 88,835.71 acres, including therein the acreage represented by 12,722.64 shares, which had once been sold by the Company, but had been bought in on foreclosure by the trustees for the Company's bondholders in order to conserve the trust estate (Defendants' Exhibit 11). The trial court treated all the shares held by the trustees as not outstanding and fixed the area of the project at 76,113.07 acres. The Circuit Court of Appeals considered 5,322.26 of such shares held by the trustees to be validly outstanding, thus fixing the area of the project as 81,435.33 (R., 682, 689). That court states that its conclusions leave "the outstanding shares of the project approximately 83,513.45," but it apparently made some error in computation, as this figure is not reconcilable with its other findings. In each case, however, the courts below were speaking of a gross acreage without any allowance for non-irrigable or non-irrigated land. Such a method of determining acreage is impracticable, is unfair to the Company and the trustees for its bondholders, and is in conflict with the policy of the Federal Government as expressed in the Carey Act, and of the State as expressed in its constitution and statutes, which permit the appropriation of water only to the extent that it can be beneficially used.

In determining the issue as to the adequacy of the water supply, there are four interdependent factors: acreage, duty of water, water available and water losses.

The issue as to acreage on this appeal is whether the Company shall be permitted to sell in excess of the 88,835.71 shares, which were outstanding at the commencement of suit; or if not, then whether the trustees shall be permitted to sell the shares they hold in excess of the 5,322.26 which the decree of the Circuit Court of Appeals permitted them to sell and which would leave outstanding 81,435.73 shares; or if not, whether the trustees shall be permitted to sell any shares in excess of 76,113.07, the limitation set by the trial court. The last alternative is the subject of the cross appeal. The factors of water available, water losses and duty of water will now be separately discussed. The importance of water losses, however, is minimized by the fact that most of the evidence as to water supply states the supply at the farmers' headgates after all losses have been deducted.

**(1) The available water supply is sufficient for an acreage well in excess of the acreage to which the water supply has been limited by the courts below.**

If we assume the duty of water to be 2¾ acre feet, as determined by the trial court, the supply of water necessary to irrigate 76,113.07 acres, the size of the project as fixed by the trial court, would be 209,310 acre feet. However, if we assume the duty of water contended for by the appellants, that is, two acre feet, the water required to irrigate such acreage would be 152,226 acre feet.

The appellees in their pleadings and testimony assumed that the court would find a lower duty of water than that determined upon, and for the most part put their allegations and evidence as to water supply in the form of asserting the number of acres that could be irrigated at a low duty from such supply.

In every case their allegations and evidence show a water supply far more than sufficient to irrigate the acreage to which the trial court reduced the project. The appellees' position as to water supply at the farmers' headgates appears in the record as follows:

*(a)* In their original complaint they alleged "that the total supply of water appropriated and available for distribution by and through the system enables the said irrigation company to furnish and deliver one-eightieth (1/80) of one cubic foot of water per second of time per acre of land to 70,000 acres and no more" (R., 31). In reaching this acreage the appellees were allowing for a continuous flow of one-eightieth of a second foot of water during a five-months' irrigation season (R., 30, 32, 234). They were thus pleading a water supply of 267,750 acre feet.

*(b)* Counsel for the appellees stated at the opening of the trial "there is a difference in the amount of water available between 200,000 acre feet and 600,000 acre feet" (R., 237), referring evidently to the gross supply shown in column 4, Plaintiffs' Exhibit 9 (R., 305).

*(c)* Counsel for the appellees before amending their complaint stated the water available to be 225,000 acre feet (R., 238).

*(d)* The complaint was amended (R., 240) at the suggestion of the court (R., 238-40) during the trial so as to allege water available amounting to 220,688 acre feet (R., 32).

*(e)* Plaintiffs' Exhibit 1 shows the average inflow at Magic Reservoir for the years 1909-1919, inclusive, to be 220,660 acre feet, to which is added the flow of Little Wood River during the irrigation season, there being no storage of this water. The average flow of this river for the irrigation season during the years 1910-1919 was 34,763 acre feet (R., 243-4). The total water available thus was stated to average 255,423 acre feet.

*(f)* Plaintiffs' Exhibit 5 "shows that the acreage of the project on an assumed duty of 3½ acre feet per acre for an 8-year average would be 63,054 acres" (R., 249). This is equivalent to stating that there is available at the farmers' headgates 220,689 acre feet (R., 249).

*(g)* Plaintiffs' Exhibit 3 (R., 252—summarized in R., 256) shows available at the farmers' headgates, after deducting a 30 per cent. loss, 220,668 acre feet.

*(h)* Plaintiffs' Exhibit 9 (R., 305) shows the average supply of water available at the farmers' headgates for eleven years, 1909-1919, inclusive, to be 265,381 acre feet.

*(i)* State's Exhibit 1 (R., 430) shows an average supply available to the Company from its sources for the years 1909-1916 (U. S. Geographical Survey figures) of 401,500 acre feet. If the percentage of loss used by the trial court, that is, 35 per cent., is deducted to reach the amount available at the farmers' headgates, the figures would be 260,975 acre feet. (Note that the 1909 at the head of column 1 should be 1909-1916 as appears by the previous page.)

The appellees put in no other evidence of the water supply available. Their lowest statement of water available at the farmers' headgates is thus seen to be 220,668 acre feet (Plaintiffs' Exhibit 3, R., 252-56); the highest, 265,381 acre feet (Plaintiffs' Exhibit 9, R., 305).

The appellants had pleaded in their answer to the complaint in intervention of the State (R., 139) the supplemental report of the State Engineer, dated November 12, 1917, and addressed to the State Board of Land Commissioners (Exhibit A annexed to Answer, R., 143). This report shows available at the farmers' headgates 261,380 acre feet.

The appellants offered the following evidence as to water supply:

*(a)* The affidavit of the State Engineer, submitted to the Secretary of the Interior on application for the pat-

ent of 117,677.24 acres, stating that the water supply was ample for such acreage (R., 443-452) and the patent issued on such application (R., 440).

*(b)* Defendants' Exhibit 1, a report of the State Engineer to the State Land Board supplemental to Plaintiffs' Exhibit 6. Exhibit 1 was, however, excluded (R., 266-69). The report was at least an admission on the part of the State, one of the appellees, as to the water supply, and was admissible as well against the other appellees who were the State's assignees.

On the issue of duty of water, the appellants offered the following evidence as to water delivered: (a) Defendants' Exhibit 13 (R., 572), showing water delivered at the main canal heads, 1911-19, to be an average of 209,031 acre feet; (b) Defendants' Exhibit 14 (R., 572), showing water delivered at the farmers' headgates, 1911-19, to be an average of 122,849 acre feet.

As in 1911 the project had but 17,464 acres in cultivation and there were but 56,864 in cultivation in 1919, obviously, the water *delivered* was not the water *available* (R., 564). Especially in the early years of the project, there was no need of conserving water and much of it was wasted. The trial court, however, ignored all evidence of water supply available and based its decision on the water delivered, treating the two as synonymous. Prior to the trial, the Company customarily delivered far in excess of the duty of water (2¾ acre feet) found by the trial court, there being in six out of nine years over 4.37 acre feet delivered. The figures are as follows: 1911, 4.51; 1912, 4.44; 1913, 4.79; 1914, 4.45; 1916, 4.66; 1917, 4.37 (computation from Defendants' Exhibit 10, R., 564, and Defendants' Exhibit 14, R., 572). The testimony of the appellees' own expert left the inference that 4.50 acre feet would produce the maximum crop (R., 400), and it is obvious that any delivery to the settlers beyond the amounts delivered in the years men-

tioned would be unnecessary and of no value. It will appear in our discussion of the duty of water, that any delivery of water approaching the amount required to produce a maximum crop is not an *economic* duty of water and is, accordingly, in conflict with the State and Federal laws and policies.

Deliveries of water shown in Defendants' Exhibits 13 and 14 were made, except for the last year or two, prior to the raising of the spillway on the Company's reservoir dam (R., 263). The evidence shows the spillway had not been raised as late as 1917, although it had been raised at the time of the trial (R., 261-3), and that this improvement would increase the capacity of the reservoir by 18,000 acre feet (R., 263). No reference is made by the courts below to this improvement.

The issue of fact before the trial court was clearly not the supply of water, but the duty of water; not how much water there was, but how much land it would irrigate. Not only the appellees' evidence makes this clear, but also the attitude of counsel for the appellees on the trial as it appears in the record is significant.

After counsel had first stated that the water supply was from 200,000 to 600,000 acre feet (R., 237) and then had stated that it was 225,000 acre feet (R., 238), the court urged that the complaint be amended, saying:

> "* * * if the court finds that a smaller amount of water than the contract amount is sufficient for your purpose, that of course will defeat your suit, as I understand it. Now, I will not entertain any applications to amend later on. This question is brought squarely to your attention at the present time, and it wouldn't be fair to the other side to permit you to amend later on if you find you are unsuccessful on this theory, and you must decide now as to whether or not you want to stand upon that application" (R., 239).

The court was referring to the appellants' complaint as it then stood, which, as we have seen, alleged in substance a water supply of at least 267,750 acre feet.

The court went on to say:

> "* * * I shall require you gentlemen in some way definitely and affirmatively to allege the number of acre feet of water that you contend is available for the irrigation of the lands on the average, the measurement to be at the lands, as you put it, where it is delivered upon the system to the private users, that measurement to be in acre feet" (R., 240).

Counsel for the appellees thereupon amended the complaint to state:

> "that the total available water supply of said Idaho Irrigation Company, Limited, actually existing, actually appropriated and available for distribution to the contract holders on said project at the headgates of the contract holders, is 220,688 acre feet * * *" (R., 31).

The appellees evidently took this figure from the data furnished by their engineers. Mr. Tallman, one of their irrigation engineers, testified (R., 255):

> "The total amount of water in acre feet that has been available for distribution on the average at the farmers' headgates for the eight years shown upon that map is 220,668 acres feet, that is the average for eight years."

On cross-examination, however, the witness admitted that he had not included in his computation certain data favorable to the appellants (R., 259). Apparently to correct the impression he had given, he was recalled by the appellees, who then put in evidence through him

Plaintiffs' Exhibit 9, which is very full and enlightening and which shows the water available to the Company, after deduction of prior decreed rights but before losses in the system, to be 379,115 acre feet (R., 305). From this the witness deducted 30 per cent. for losses to reach the amount available at the farmers' headgates, and found the average for eleven years to be 265,381 acre feet. The witness states (R., 306):

> "By adding the three previous years that I had not included yesterday, it increases the total amount available at the farmers' headgates from 220,000 in round numbers to 265,000 as an averrage."

This figure is substantially in accord with the amount alleged by the appellants in their answer (R., 139), and with the amount shown in their Exhibit 1, which was excluded (R., 143).

The figure given was also sustained by the report of the State Engineer, which was put in evidence by the State, and which showed in the seventh column a total water supply available to the Company of 401,500 acre feet (R., 429-30). The evidence shows the system loss to be 30 per cent.

The trial court ignored entirely the testimony of the engineers for the appellees, which was based for the most part on United States Geographical Survey figures (R., 430, 264), and computations as to loss based upon their experience as engineers. Their bias, if any, would lean to the appellees, who employed them, paid them and called them as witnesses. But the court adopted an entirely original method of ascertaining the water available based upon the water delivered. There was, in fact, no reason to put any particular faith in the figures of water deliveries, since the measurements were of purely academic interest during the greater part of the

period when the water supply was more than ample and since such measurements were taken by ordinary employees not trained in the Geological Survey Service.

Obviously, too, during the period when the area of the land under irrigation was small, water must have been retained in the reservoir from year to year, and what was carried over reduced correspondingly the ability of the Company to store and conserve the runoff during the next year. A correct conclusion cannot be drawn as to the capacity of the system from what it had delivered during the years when the system was not taxed to its full capacity.

The case was tried in February, 1920, and submitted for decision while the amended complaint alleged a water supply available of 220,668 acre feet. A decison was handed down in July, 1920, based on a method of calculation of water supply which neither the appellees' counsel nor its witnesses even suggested at the trial and which was apparently not approved by any engineer appearing in the case.

This decision was based on the trial court's calculation of the water supply available as the *average* of the water *delivered*. This method was a surprise to the appellants. Had any suggestion been made at the trial that the court or the appellees were considering or suggesting such a method, the appellants might have met the issue by showing the fallacy of such an approach. The opinion of the trial court concludes with this statement:

> "I am not sure just what the status of the pleadings is, touching the matter of the amount of water available to the defendant. It is possible that owing to the inability of the plaintiffs sooner to get access to the defendant's records, there is an averment or admission of an available supply in excess of that for which the plaintiffs now contend" (R., 152).

And the court then permitted the appellees to amend the complaint to show a water supply available of 122,817 acre feet. The trial judge at this point had apparently forgotten the circumstances under which he had early said to the appellees (R., 239): "* * * it wouldn't be fair to the other side to permit you to amend later on if you find you are unsuccessful on this theory" (that of a low duty of water).

The order amending the complaint was filed (R., 98) December 24, 1920, *four days after the filing of the decree* (R., 160).

There is abundant evidence throughout the record that the appellees had at their disposal whatever they asked for of the Company's records. Such as they called for were given them. They put on the stand the Company's manager (R., 431), and they put in evidence the deposition of the Chairman of the Security Holders' Protective Committee (R., 437); and from the record it appears that all questions were willingly answered. The suggestion that the Company's records were not accessible to the appellees was apparently an afterthought to account for the unusual amendment of the complaint after the decree was filed. The right so to amend has been based on a stipulation that the pleadings be amended to conform to the proof, but whether the amendment does conform to the proof is a very pertinent question which this Court may consider.

This Court has taken the position that in the arid states, in determining the available water supply from a given source, the average flow over a period of years is not a proper test; that there should be excluded, before taking an average, the years of extreme flow and the years of exceptionally scant supply. (*Wyoming* v. *Colorado*, 259 U. S., 419, 476, 484.) For this position it has been said that, on the one hand, the excess water available in the years of extreme flood cannot be spread over

the remaining years so that it can be of practical use to the farmer, and, on the other hand, that if the occasional years of exceptionally low flow are made the measure of supply the waste of water which is so valuable in a desert country is too great; irrigation areas, as well as other farming lands, must suffer somewhat from dry years.

Applying such a method of ascertaining the water supply to the facts in our case, we find on checking the appellees' figures for water supply available to the Company shown in the fourth column of Plaintiffs' Exhibit 9 (R., 305) that in six out of eleven years the supply exceeded the average of 379,115 acre feet and in five years the supply did not equal the average. We find, further, that in two years (1910-11 and in 1916-17) the supply exceeded 500,000 acre feet, and in two years (1914-15 and 1918-19) it was less than 200,000 acre feet. If we eliminate these four years as abnormal, the average of the remaining seven years is 378,352 acre feet—substantially the same figure as the average of the whole. This figure and the average of 379,115 acre feet given at the foot of column four of Plaintiffs' Exhibit 9 are subject to losses before the water reaches the farmers' headgates. The appellees' engineer, Tallman, who prepared Plaintiffs' Exhibit 9, testified that the figure mentioned would have to be reduced by 30 per cent. to give the amount of water available at the farmers' headgates. He made the computation and found the supply at the farmers' headgates to be 265,381 acre feet, which he wrote at the foot of the exhibit (R., 305-6). The average supply for the seven normal years computed above, when reduced by 30 per cent. for losses, amounts to 264,847 acre feet. It will thus be seen that the method applied by the Court in *Wyoming* v. *Colorado* would not materially change the results as to water supply.

Whether the trial court should have gone into the question of water supply at all has been dealt with in earlier portions of this brief. It would seem that at some definite time the rights of the parties as to water supply must have become fixed. During the six years just prior to 1915, when the patent was issued, the water supply was heavy. Since then there have been a few scant years, notably 1915. If the water supply is fixed on the basis of the figures prior to 1919, it may in later years be more abundant or it may be less. In that case should a court again presume to redetermine the supply? The obvious time to determine the supply was at the time of issue of patent, as the Carey Act and the State laws provided, and that was done by the Secretary of the Interior.

The trial court failed to give due consideration to the computations furnished by competent witnesses on both sides, who determined the supply. To ignore completely all the evidence of water available was error.

**(2) The losses of water in transmission to the farmers' headgates were determined by the trial court at an excessive amount.**

The trial court found these losses to be 35 per cent. (R., 150). No witness on either side suggested so large a loss.

The appellees' witness, S. T. Baer, who as Assistant State Engineer, had made scientific measurements of the losses in the system, testified that he had found them to be 29.7 per cent. (R., 264). All other witnesses for the appellees had stated the loss to be 30 per cent. (R., 247, 252, 256, 258, 260, 267, 279). There was no controversy between the parties as to the loss.

The trial court, however, using its own method of computation, as appears in the opinion (R., 150),

brushed aside all the testimony. The difference between the water *delivered* at the main canal heads and that *delivered* at the farmers' headgates was assumed to be the system loss. No allowance was made for the fact that much of the water available and delivered at the main canal heads was not needed at the farmers' headgates for irrigation (we have shown that the company delivered from 4.37 to 4.79 acre feet per acre in six out of nine successive years and the irrigated lands could not use more). Moreover, during that period *large* canals were being used to carry *small* heads of water. When so used the loss in acre feet is the same as though the canals were carrying their full capacity, but the *percentage* of loss is very much greater.

Neither did the court make any allowance for the fact that much water was turned into the canals and never delivered to the farmers but turned out through waste gates or through the gates of laterals. Mr. Crosby, one of the irrigation engineers, said that the difference between the amount delivered and the amount diverted "includes wastage out of the ends of the laterals which was never delivered or pretended to be delivered" (R., 574). Another consideration which the trial court apparently did not allow for is the difference in efficiency between a new and an old system. (*State* v. *Twin Falls-Salmon River Land & Water Company*, 30 Idaho, 41.) The 5 per cent. difference in transmission loss may seem to be a small matter, but if 220,668 acre feet at the farmers' headgates is but 65 per cent. rather than 70 per cent. of the water available from the Company's sources, the additional loss on the 35 per cent. basis has been 24,249 acre feet—enough to supply over 6,000 acres at a duty of 2¾ acre feet. And at $60 an acre, the rate at which these water rights have customarily been sold, the loss to the Company would exceed $360,000.

**(3) The duty of water found by the trial court was unreasonable.**

If the determination of the Secretary of the Interior, that the water supply was ample for the project, is conclusive, as we have contended, a finding of the duty of water in this suit is unnecessary.

The trial court found that the contracts between the Company and the individual appellees entitled the latter to an ample supply of water, but that no definite amount was specifically named in the contracts. The Circuit Court of Appeals adopted the appellees' contention that the contracts called for a specific amount, viz., 1/80 of a second foot* per acre throughout the irrigation season, which would be equivalent to 5½ acre feet (R., 234-5, 669, 674). The trial court did not approve this contention. Putting aside the finding of the Secretary of the Interior as to what would be an ample supply, it decided upon 2¾ acre feet.

This finding need not necessarily have been in conflict with the finding of the Secretary. If the water available were determined on the basis of the report of the State Engineer, based on geological survey figures (State's Exhibit 1, R., 429-30), or Plaintiffs' Exhibit 6, or on Plaintiffs' Exhibit 9, there would be 2¾ acre feet for every acre ever likely to be in cultivation. As it has appeared, the court used no such basis.

The duty of water can be scientifically measured up to the point of diminishing returns. At that point the economic problem arises as to whether the additional water shall be supplied to irrigated land so as to force the last bushel out of that land, or whether it shall be applied to new tracts where it will produce perhaps twice as much. In other words, whether there shall be the

*Equivalent to 1/80 of a cubic foot per second of time per acre or five eighths of a miner's inch.

maximum agricultural development, or the reclamation of the maximum acreage. In a land of limited water supply the answer should be obvious. And the administration of public land under the Carey Act and the doctrine of the beneficial use of water, which is general in the arid States (Idaho Constitution, Art. 15), support such a determination. The appellees, in the court below, characterized this doctrine as "the theory that three starving and dissatisfied families are a greater economic asset to a community and a State than two contented and prosperous ones." To which it may truly be said that dissatisfied families of farmers are more often the product of a surplus of crops raised at an uneconomic cost.

Whether the excess cost is in labor, materials, or water, it should be expended on new land rather than in forcing the utmost crop from cultivated land, as soon as it appears that the new land will yield a large crop at less cost. This principle is emphasized by Dr. Harris, the appellees' irrigation expert, who, after going into detail as to the results of experiments to ascertain the duty of water, says (R., 403):

> "By increasing the use of water 100 per cent. I increased the yield about 10 per cent. By using 30 acre inches on a single acre I got a yield of somewhat more than 48 bushels. So by using three times the amount of water I obtained a yield of somewhat more than five or six bushels. By increasing the amount of water 200 per cent. I obtained an increase in the yield of about 12 per cent. By increasing the water above 15 acre inches for alfalfa and 10 acre inches for wheat, the yield does not increase proportionately. Like any expenditure of water or anything else, the first is usually the most efficacious. It never does in anything of that sort. The law diminishing returns enters. It applies in this question as in all other questions."

Where the farmer meets diminishing returns in the application of his labor, or any other asset, he transfers

his efforts to new land. Shall he be permitted in this case to apply additional water to old lands for diminishing returns because it will cost *him* nothing, while virgin land in the patented area remains worthless for want of water?

It should be remembered that even in 1915, a drought year in all Idaho, when the appellees received much less water than they have been contending for, they raised two crops (R., 308, 333). And when they complain of a shortage of water it is because, as stated in the appellees' brief below, "the undisputed and cumulative testimony of the farmers was to the effect that in 1911, 1912, 1913, 1914, 1916 and 1917 they got three good crops."

The appellants contended on the trial that two acre feet for such of the irrigable area as might at any time be in cultivation would be an ample supply of water. On the Oakley project, close to the Company's tracts, the State and Federal Governments approved a duty of water of 1½ acre feet, and that was the amount fixed in the contracts between the settlers and the company and determined by the court *(Twin Falls-Oakley Land & Water Co.* v. *Martens,* 271 Fed., 428). On the Salmon River project, also close to the Company's tracts but having a little lower altitude and less precipitation and a shallow soil underlaid by hardpan (R., 459-60), the judge who tried this case found the reasonable duty of water to be 2-1/3 acre feet *(Twin Falls-Salmon River Land & Water Co.* v. *Caldwell,* 272 Fed., 356).

In *Wyoming* v. *Colorado,* 259 U. S., 419, 496, this Court decided that a duty of water of "one acre foot per acre for the larger part of the lands" supplied was ample, and allowed 2 acre feet and 2½ acre feet for different parts of the balance. Yet, on the Company's tracts, the trial court has set the duty at 2¾ acre feet.

But even that duty is only an ostensible figure. For the trial court fixed the duty "without deductions for roads or other non-irrigable tracts" (R., 149). When it

is remembered that the highest acreage ever in irrigation, that in 1919, was but 56,864 acres (R., 564), roughly 63 per cent. of the acreage of 88,835.71 for which shares were then outstanding, it will be seen that the trial court intended the acreage in cultivation to receive much more than 2¾ acre feet. If the percentage of acreage in cultivation to acreage sold is 63 per cent., the water available for each acre, on the trial court's basis, would be 4.36 acre feet. If such acreage is 75 per cent. (approximately the percentage reached by the appellees in estimating 90,000 of the 117,000 acres in the patented area to be the maximum that could be in cultivation at one time), the water available for each cultivated acre on the court's basis would be 3.66 acre feet.

The determination of the duty of water is obviously a scientific question, and can only be approached in a scientific manner. The appellants offered to the trial court the results of the experiments and study of several of the scientists and other experts best known in the subject of irrigation: Dr. C. C. Thom, a man who, for two years prior to the trial, made the most exhaustive study of the Company's project (R., 452-3); Dr. Widstoe, president of the University of Utah, former president of Utah Agricultural College and author of "The Principles of Irrigation Practice" (R., 494); Don H. Bark, an authority on irrigation, who spent many years on the Company's project on behalf of the Federal Government and carried on extensive investigations of a most practical character (R., 521). Bark's work is referred to in every treatise on irrigation.

Dr. Thom gave as his opinion that two acre feet would be ample for the net irrigable area, assuming a crop of half alfalfa and half grain (R., 552-53). On the same basis, Mr. Bark put the requirements at two acre feet (R., 528-31); and Dr. Widstoe testified to the same duty (R., 497-98). A practical farmer, residing on the Salmon River project close by, gave as his opinion, based

upon his own experience with a small amount of water, that two acre feet at the farmers' headgates should be the duty of water on the Company's project (R., 565-68).

On the other hand, the appellees offered the testimony of one scientific witness, Dr. Harris, a professor at Utah Agricultural College. He states:

> "I am *somewhat* familiar with the Idaho Irrigation Company's project * * * from the observations I could make in a *superficial* way I became familiar with the general character and condition of the substrata (R., 382-3; italics ours). * * * I hesitate to fix any definite duty of water, because it is dependent upon economic, social and other conditions that it is impossible to determine, but I should think from the information I have on the subject that the farmer should have delivered to him at his head gate at least 4½ acre feet * * * " (R., 398).

This witness later stated that but 2 feet of this supply would be needed for the crops and 2½ feet would be lost on the farm (R., 423). Of course, much of the water lost would go to some other farm and would not be lost for the project (R., 338, 531). He stated, too, that 4½ feet would produce the *maximum* crop if 40 per cent. of the tract were in grain (R., 400), and admitted that when the water is increased above a certain point the crop rapidly decreased in proportion (R., 402-4). Dr. Harris had made no experiments on the Company's tracts (R., 385). Dr. Thom and Mr. Bark had made exhaustive experiments over a period of years on the tracts (R., 453, 523).

The engineers who testified for the appellees as to water supply—Tallman, Badley, McConnell and Baer—did not give their opinion as to the duty of water, except inferentially as they approved exhibits and charts which they compiled showing how many acres could be irrigated from various duties, and they used the figures 3½, 4 and 4½ acre feet (R., 305).

It is to be observed that the demand of the appellees for a large supply of water is based on an assumption

that the project will be largely in one crop, alfalfa. Mostly any other crop, such as wheat, oats, corn, potatoes, etc., or an orchard, would concededly require much less water (R., 149, 400, 528-9, 538). There was evidence that any other crop would require but 1½ acre feet (R., 529).

The appellants, in determining the duty of 2 acre feet, stated the project to be 50 per cent. in alfalfa and 50 per cent. in grain (R., 528). The appellees' witnesses assumed it to be 60 per cent. in alfalfa (R., 400-1), and the trial court estimated that "approximately two-thirds of the acreage will ultimately be devoted to the raising of hay and root crops, requiring larger amounts of water, and one-third to grains, requiring smaller amounts" (R., 149). Possibly in a region of limited water supply the crop requiring the most lavish use of water will pay the farmer best, particularly if he can obtain the excess of water as contemplated here at the cost of the Company and its bondholders, by enjoining the use of water for other lands. But it is obvious from their own evidence of duty of water and water supply, that if the appellees are willing to devote a reasonable part of their lands to grains and other staple crops, there will be ample water for the entire patented area.

The farmer who can get two crops of alfalfa in a drought year (R., 308, 333) on a supply of less than that held sufficient by the trial court and who, if the worst comes to the worst, may be driven to forsake alfalfa for grain and other crops for which 1½ acre feet is ample, is not in a position to call upon a court of equity for relief. Especially not when such relief means a tremendous loss to the Company's bondholders, who furnished the capital to construct the irrigation works.

Whatever the crop, however, if an economic duty of water is fixed, there is an ample supply of water for the whole project on the appellees' evidence; and the evidence is all to the effect that there is a tremendous waste of a great natural resource in attempting to fix a duty of water that will produce the very maximum yield

of any crop. The Carey Act never contemplated such a duty. It contemplated the production of "ordinary agricultural crops," not of extraordinary, either in kind or in amount. The development of the arid waste depends upon a reasonable economic duty, and the authority to establish the public policy as to Carey Act projects has been vested in the Secretary of the Interior and the State Land Board, both of which in this instance have spoken when the patent was issued.

The utter waste of attempting to raise the maximum crop per acre in a country of slight rainfall was strikingly shown on cross examination of appellees' expert, Dr. Harris. He said (R., 402):

> "Referring to Plaintiffs' Exhibit No. 17, showing the results of my experiments with alfalfa, it shows that the application of 15 acre inches of water would yield over 4 tons, and that the application of 45 acre inches of water gave 4-2/3 tons. By the application of three times as much water I received but two-thirds of a ton more of alfalfa. * * * Had I put the 45 acre inches on three acres instead of on one acre, the result would have been 12 tons."

On the lowest statement of the water supply available appearing in the appellees' evidence, that is, 220,668 acre feet (R., 32, 256), there would be available at the farmers' headgates, on the duty of 1½ acre feet fixed on the Oakley project by the State, the Secretary and the court, water sufficient for 146,000 acres; on the basis of the duty of one acre foot fixed by this Court for the greater part of the area involved in the case of *Wyoming* v. *Colorado, supra,* such amount of water available would be sufficient for in excess of 220,000 acres, and on the duty of 2 1/3 acre feet determined for the Salmon River project by the same judge who tried this case, such a supply of water would be sufficient for 94,000 acres.

## VII.

## Conclusion.

The decree of the Circuit Court of Appeals should be reversed and the District Court instructed to dismiss the bill with costs.

Not only is there no inadequacy in the water supply, but its adequacy is not a question for the courts to review. All the parties to this suit invested in the project, knowing either that the adequacy of the water supply had been determined by the Secretary of the Interior, or that it was his province to determine it. He has decided that the supply is ample to reclaim the patented acreage. That decision is not subject to collateral attack. Especially ought not the Court to permit the appellees to complain, since the State (the grantor of the other appellees) has accepted and holds the granted lands on the terms set forth in the Carey Act as amended, and the State's action in relation to the project lies at the very foundation of the Company's investment.

The Company's permits to divert water were known to the appellees when they purchased water rights. The Company has, at great expense, constructed the irrigation system according to the plan approved by the public officials. Properly construed the contracts between the Company and the purchasers of its water rights entitle the latter to only a proportionate share in the water supply as apportioned by the Secretary's decision. Conceding, however, for the purpose of argument that these contracts entitle the appellees to a specific amount of water in excess of that apportionment, and still as between the Company and its bondholders on the one hand and the appellees on the other, it is inequitable to make the entire loss fall on the former instead of reducing somewhat the amount of water that will be received by

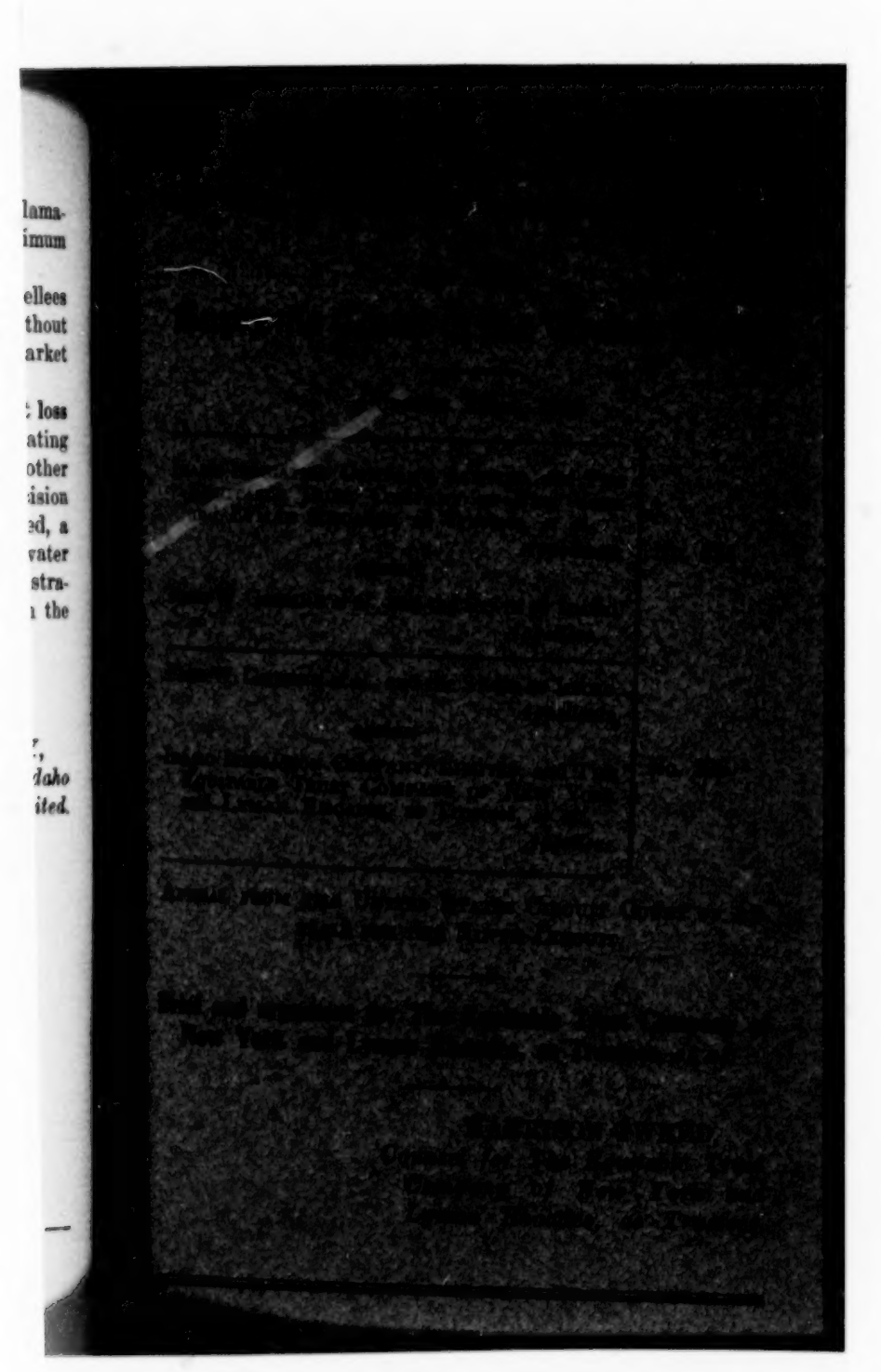
the latter. Moreover, public policy demands the reclamation of the greatest acreage rather than the maximum agricultural development of a smaller area.

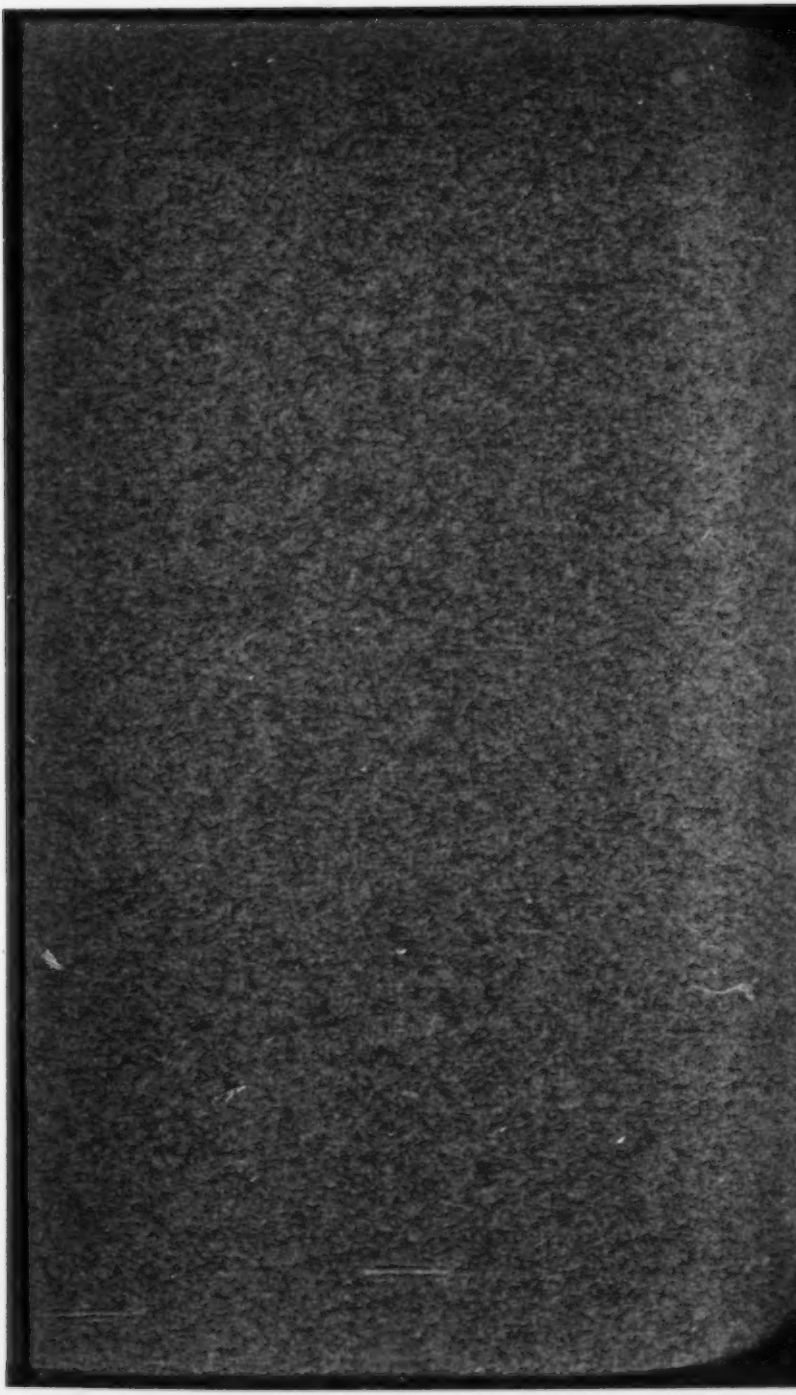
If the water supply is as inadequate as the appellees claim, they will be protected by economic laws, without the aid of a court of equity; for there will be no market for additional water rights.

The decision of the lower courts results in great loss to the Company and its bondholders. By intimidating capital, the decision impedes the reclamation of other desert land. Notwithstanding the Secretary's decision that an ample supply of water has been furnished, a large part of the patented acreage is left without water and must remain arid in character. The administration of these pubic lands is thus transferred from the Federal land officials to the courts.

Respectfully submitted,

GORDON M. BUCK,
RAYMOND J. SCULLY,
*Counsel for Appellant, Idaho Irrigation Company, Limited.*





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STATUTES CITED

# Supreme Court of the United States,

OCTOBER TERM, 1923.

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|---|---|
| IDAHO IRRIGATION COMPANY, LIMITED, and THE EQUITABLE TRUST COMPANY OF NEW YORK and LYMAN RHOADES, as Trustees, *et al.*, *Appellants,* *against* FRED W. GOODING, *et al.*, and the STATE OF IDAHO, *Appellees.* | No. 324 |
| FRED W. GOODING, *et al.*, and the STATE OF IDAHO, *Appellants,* *against* IDAHO IRRIGATION COMPANY, LIMITED, and THE EQUITABLE TRUST COMPANY OF NEW YORK and LYMAN RHOADES, as Trustees, *et al.*, *Appellees.* | No. 336 |

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

## Statement of Facts.

The state of the record and the facts of the case are stated in the brief of counsel for the Idaho Irrigation Company (herein called the "company"), on the main appeal, No. 324. There will be here stated only such

additional facts as are material to the particular issues covered in this brief.

Gooding, *et al.*, are settlers upon lands within the project and were the plaintiffs below. They are appellants on the cross-appeal, No. 336, and appellees on the main appeal, No. 324.

The Equitable Trust Company of New York and Lyman Rhoades are the trustees under a certain Adjustment Mortgage executed by the Idaho Irrigation Company, Limited, to secure an issue of bonds held by the public. (Rec. 17, 24, 33.) Kayes is the legal owner of certain lands and water rights purchased at sheriff's sale, and held by him, as agent of the mortgage trustees. (Rec. 18, 33, 169.) They were defendants below, and are appellants in No. 324 and appellees in No. 336.

Disney, *et al.*, intervened in the District Court, and are appellants in No. 324 and appellees in No. 336. (Rec. 166.) They are settlers upon land within the project purchased by them from the mortgage trustees after the commencement of the suit and the filing of *lis pendens*, but before the trial. (Rec. 169.)

As security for the bonds issued under the Adjustment Mortgage, the company mortgaged and pledged all of its property, both real and personal, including the contracts for the sale of water rights between the company and the settlers. (Rec. 24.) The contracts so mortgaged contained, as security for the payment of the purchase price, a pledge of the shares representing the water rights sold and an agreement by the purchaser to mortgage his interest in the Carey Act land to be acquired by him. (Rec. 93.) These liens were authorized alike by the Carey Act and the Idaho statutes. (29 Stat. L. 43, 4, Idaho Revised Codes, 1907 Sec. 1629.) The contracts expressly provided that they might be assigned by the company. (Rec. 95.) They

further provided that upon a default in the payment of any instalment of the purchase price, the whole amount due might be declared payable and the liens enforced against the lands and water rights. (Rec. 93.) Certain purchasers of the water rights did default in the payment of the purchase price, whereupon the liens were enforced and the lands and water rights were acquired by purchase at sheriff's sale or otherwise by the mortgage trustees, or by Kayes, as their agent. (Rec. 33.)

The figures with respect to the water rights so acquired by the mortgage trustees are as follows: 8,467.07 shares were held by the mortgage trustees at the time of the commencement of the suit. After the commencement of the suit, but before the trial, the mortgage trustees acquired 4,255.57 additional shares, making a total of 12,722.64, which is the number which would have been held by the trustees at the time of the trial if none had been sold by them pending the trial. In fact, 3,143.61 were so sold by the trustees to Disney, *et al.*, the interveners. (Defendant's Exhibit 11, and Rec. 568.)

It is clear that these shares fall into three classes:

(1) Shares sold by the trustees to settlers after the commencement of the suit and before trial—3,143.61;

(2) Shares acquired by the trustees after commencement of the suit and before trial—4,255.57;

(3) Shares held by the trustees throughout, from the commencement of the suit to the time of the trial—the number of these shares does not appear in the record. If it is assumed that the 3,143.61 shares sold by the trustees all came from the 4,255.57 shares purchased by them after the commencement of the suit, then the number of shares held by the trustees throughout is 8,467.07. If, on the other

hand, it be assumed that the 3,143.61 shares sold by the trustees all came from the 8,467.07 shares owned by them at the time of the commencement of the suit, then the number held throughout is 5,323.46.

The Circuit Court of Appeals modified the injunction of the District Court to the extent of excluding therefrom the shares held by the mortgage trustees throughout from the commencement of the suit to the time of the trial. It assumed that the number of such shares was only 5,322.26. Apparently there is a slight mathematical error in the calculation of the Circuit Court of Appeals, since on the assumption referred to, the figure should be 5,323.46.

We may say here that if this Court should be of the opinion that the shares held by the mortgage trustees throughout, from the commencement of the suit to the time of the trial, and these shares only, should be excluded from the injunction, it is submitted that the assumption of the Circuit Court of Appeals that the number of such shares is 5,322.26 should not be accepted. If any assumption is to be indulged it should be that the number is 8,467.07. That is the number of shares held by the trustees at the commencement of the suit, and the shares *disposed of* thereafter and before the trial were less in number than those *acquired* during that period. Therefore, it may logically be assumed that the shares disposed of pending the trial came from those acquired during that period. If neither assumption is indulged, there should be a proportionate allocation, or the District Court should be directed to make a finding upon the question and the final decree should be entered in accordance with such finding.

## ARGUMENT.

### Introduction.

The brief and argument of counsel for the company sets forth the grounds which establish that the injunction restraining *the company* from issuing additional water rights should be dissolved. They apply—and with greater force—so far as the injunction prevents *the mortgage trustees* from selling water rights acquired under foreclosure. We adopt them on behalf of the mortgage trustees, but shall not restate them, since the purpose of this brief is to set forth *the independent reasons* which, in our opinion, establish that the mortgage trustees cannot be restrained from selling the water rights acquired by them under foreclosure, and therefore, sustain the decision of the Circuit Court of Appeals in excluding from the injunction the water rights which they held throughout, and demonstrate that the water rights acquired or sold by them during the pendency of the suit should be similarly excluded.

### POINT ONE.

**The water rights acquired pursuant to foreclosure were held by the mortgage trustees or their agent as mortgaged assets for the benefit of the bondholders.**

Throughout the brief on behalf of the cross-appellants (the plaintiffs below), the water rights acquired pursuant to foreclosure are treated as if they had been acquired and were owned *by the company* free and clear of any mortgage. No reason is assigned for thus ignoring the alleged, admitted or proven facts that they were

mortgaged assets held primarily for the benefit of the bondholders, and it is impossible to ascertain on what theory, if any, the plaintiffs attempt to sustain their disregard of the facts. The nearest that they come to giving their reasons is the statement on page 26 of their brief that it was admitted in the answer that these shares "are the assets of the Idaho Irrigation Company, Ltd. and are held for the benefit of the bondholders of said company" and that it was stipulated that the company was the "beneficial owner" thereof. The admission and stipulation referred to will hardly bear the construction given them. The admission in the answer clearly states that the shares were held for the benefit of the bondholders. The statement in the stipulation that the company was the beneficial owner, both technically and naturally, means that the company was the owner subject to the mortgage, and in view of the circumstances under which it was made that is the *only* meaning which can be ascribed to it.

It may be well, however, to examine the allegations and the proof. The complaint alleges that "for the purpose of securing funds with which to build and construct said irrigation works and system * * * the said Idaho Irrigation Company, Limited, made and executed its certain Adjustment Mortgage, mortgaging, pledging, covering and conveying all of its dams, ditches, laterals, canals and headgates and other property, both real and personal, of all kinds, to secure an issue of bonds as in said Adjustment Mortgage provided and described." (Rec. 24.) The Adjustment Mortgage is attached to and made a part of the complaint. It covers after acquired as well as presently owned property. The granting clauses expressly include all water right contracts, and among the covenants of the company is the obligation to deliver to the trustee, accompanied by

proper instruments of assignment and transfer, any pledged contracts which may come into the possession or control of the company.

The complaint further alleges that The Equitable Trust Company and Lyman Rhoades are the trustees under the Adjustment Mortgage. (Rec. 17, 18.) It alleges that The Equitable Trust Company and Lyman Rhoades, as Trustees, and Kayes, were the trustees "for the stockholders of said Idaho Irrigation Company, Limited, and for the holders of bonds issued under and by virtue of said Adjustment Mortgage, heretofore referred to, and are holders as such trustees of" certain described lands and water rights. (Rec. 18.) The lands and water rights referred to are clearly those acquired pursuant to foreclosure.

Finally, the complaint alleges that the company or the trustees acquired by purchase at sheriff's sale, and otherwise, certain of the water rights sold to settlers and that they "are now held in the name of The Equitable Trust Company and Lyman Rhoades and M. R. Kayes as trustees, and the said M. R. Kayes, The Equitable Trust Company and Lyman Rhoades hold the same as trustees, for the stockholders of the Idaho Irrigation Company, Limited, and for the holders of the bonds of the Idaho Irrigation Company, Limited, and that the same are, in fact, the assets of the said Idaho Irrigation Company, Limited, held by the said Equitable Trust Company, Lyman Rhoades and M. R. Kayes, for the benefit of the stock and bond holders of said company." (Rec. 33, 34.)

In the stipulation admitting defendants' Exhibit 11, it is stated with reference to the sale of the 3,143.61 shares that "such sales were made by the trustees." It is further stated with reference to the 12.722.64 shares that they were "held in the name of the various trus-

tees, but the Idaho Irrigation Company is the beneficial owner thereof, that that is the land to which Mr. Kayes' testimony applies, that the Idaho Irrigation Company is the beneficial owner thereof." (Rec. 569.) The testimony of Keyes referred to was that

> "At that time, there were certain lands standing in the name of M. R. Kayes, Trustee, Lyman Rhoades, Trustee, and Equitable Trust Company of New York, Trustee. I believe the Idaho Irrigation Company to be the owner, the beneficial owner, of lands standing in the names of the various parties mentioned and was the beneficial owner at the time of the filing of the complaint and *lis pendens* in the District Court." (Rec. 434.)

Defendants' Exhibit 11 was a classification of the various holdings of water rights, and its substance has already been stated. The 12,722.64 shares were classified as shares "appurtenant to lands owned by the Idaho Irrigation Company and its trustees." The summary of this exhibit, at page 25 of the brief of the plaintiffs, wherein it is stated that these shares were "held by the company", is inaccurate, to say the least.

It is true that Exhibit 11 does not unequivocally state that the shares acquired pursuant to foreclosure were held by the mortgage trustees, but that is clearly enough established by the pleadings and testimony as a whole. If any of them were temporarily or inadvertently held by the company they were nevertheless mortgaged assets to which title and the right to possession was vested in the mortgage trustees. In the nature of things it could not be otherwise. The contracts of sale to the settlers were pledged with the mortgage trustees. Those contracts constituted a pledge of the water rights sold to the settlers and gave the right to foreclose thereon in the event of default in the payment of the purchase

price. The contracts were expressly assignable by the company. When default occurred and the rights of the mortgage trustees were exercised, the lands and water rights so acquired became mortgaged assets held by the trustees for the benefit of the bondholders.

There is no allegation and no proof and no suggestion that the bondholders have been paid or that the security held by the mortgage trustees is more than sufficient to liquidate the bonded debt. The fact is very far to the contrary.

If the theory of the plaintiffs is that the equity of the company in the mortgaged assets requires that those assets be treated as if owned by the company free and clear, and that the rights of the bondholders be ignored, we need say no more than this: that if their theory should be adopted, the entire law of mortgages would be wiped away.

The complaint suggests the theory that certain acts of the bondholders have deprived them of their standing as mortgagees. This theory is not mentioned in the brief and would seem therefore to have been abandoned. We may, however, mention the allegations apparently designed to sustain it. They are that the company caused the certificates representing its capital stock and the capital stock of the Big Wood Reservoir & Canal Company to be transferred to a bondholders' committee, that thereby the ownership of the stock became vested in the same persons who were the holders of the bonds, and that the bondholders "became and ever since said date have been and now are the stockholders of the said Idaho Irrigation Company, Limited." (Rec. 24, 25.) There is the further allegation that "the affairs, property rights and franchises of the said Idaho Irrigation Company, Limited, are now being run, managed and operated by said

bondholders' committee solely for the benefit of the holders of the stock and bonds of said company, which said persons are identical." (Rec. 26.)

These allegations constitute a jumble of unproven facts and unsound legal conclusions. But we think that even if the facts were true and the legal conclusions sound, they would not tend in any way to indicate that the bondholders have lost their standing as mortgagees.

A bondholder is not deprived of his standing as a bondholder by the fact that he has deposited his bonds with a committee or the further fact that stockholders have deposited their stock with the same committee. A committee does not acquire the beneficial ownership of deposited securities. It merely holds and controls them in the interests of the depositing owners. Furthermore, a bondholder does not cease to be a bondholder simply because he owns some stock. An identity of ownership of the stock and bonds of a corporation does not destroy the distinction between the rights of stockholders and the rights of bondholders; it merely means that a dual relationship is preserved in a single personality.

The significance of the allegation that the company is being managed by the bondholders' committee for the benefit of the holders of the stock and bonds of the company is not apparent. The affairs of a corporation are customarily managed by the stockholders, and there would seem to be no reason why they should not be managed for the benefit of the holders of the stock and bonds. If the allegation is intended to mean anything more than that, it is unproved, for the plaintiffs' own witness testified that "the bondholders of the Idaho Irrigation Company did not take over the control and management of that company." (Rec. 440.)

Such allegations cannot obscure the fundamentals of the situation—that the contracts were mortgaged to the

bondholders, that the water rights in the hands of the trustees are merely the proceeds of those contracts, and that to prevent their sale is in effect to take mortgaged assets from the bondholders and present them to certain alleged contract creditors.

The District Court seems either to have failed to recognize the distinction between ownership by the mortgage trustees and ownership by the company, or else to have assumed that the water rights acquired by foreclosure were owned by the company instead of by the trustees. Probably the explanation is that at the trial the mortgage trustees were not represented by independent counsel, so that the point was not impressed upon the court. All that the District Court said was:

> "As to the lands and water rights purchased by the defendants at foreclosure sale, there is a measure of merit in the suggestion that such water rights are appurtenant to the land, and that the footing of the defendants is the same as that of any other owner, but even so, the consideration presents no serious difficulty. If defendant sold water rights in excess of its available water supply it did wrong, and if to right such wrong we reduce the project by extinguishing rights *of the wrongdoer*, however it may have acquired them, there is no one to complain. *No private party has any adverse interest*, public policy will be subserved, for both the federal and state statutes contemplate an ample rather than an insufficient supply for all lands within the project, and defendant is not injured, for by the proposed action the project will be simply reduced to the size at which it should have been held, under the law. In other words, after the proposed reduction, the defendant will have as many contracts in the aggregate as it originally had the right to sell, and hence the

plaintiffs' prayer is for a restoration of the project to a legal status, by taking *from defendant* water rights which, though legally acquired, are the equivalent of other rights which *it* illegally sold, and the proceeds of which *it* appropriated and retains." (Rec. 145, 146.) (Italics ours.)

This is not demonstration; it is mere arbitrary statement.

## POINT TWO.

**The Circuit Court of Appeals correctly decided that the mortgage trustees should not be restrained from selling the water rights held by them throughout, from the commencement of the suit to the time of the trial.**

The Circuit Court of Appeals held that there should be excluded from the injunction granted by the District Court the shares acquired by the mortgage trustees under foreclosure and held by them from the commencement of the suit to the time of the trial.

The theory of the plaintiffs' case, as we understand it, is that they are the holders of shares of stock which represent the right to a specified amount of water annually; that those shares were purchased under contracts whereby the company agreed that when shares representing the entire water supply had been issued, it would issue no more; and that the company has, in fact, issued shares in excess of the water supply. If we leave out of consideration, as we must for purposes of the present discussion, the question of the existence and validity of such provisions, and the standing of the plaintiffs to enforce them in a court of equity, it may

be admitted that the plaintiffs are entitled to an injunction restraining *the company* from issuing additional shares and from selling any shares re-acquired by foreclosure. The basis for such relief would be simply that the plaintiffs may specifically enforce against the company its agreement not to issue such shares. But the plaintiffs cannot enforce that agreement against the mortgage trustees because every shareholder agreed that, as against any other shareholder, he should have no claim to a priority in the use of water.

The contracts between the company and the settlers expressly stated that they were made pursuant to and subject to the contract between the company and the State of Idaho, and were to be construed in conjunction with that contract. (Rec. 96.) That contract provided that no shareholder should have any prior claim to the use of water, but should be entitled "to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system." (Rec. 73.) The courts are unanimous in holding that there is no priority between shareholders, even as against one who knew that the water supply had been exhausted at the time he acquired his shares.

*Twin Falls etc. Co.* v. *Caldwell*, 242 Fed. 177, 194 (C. C. A., 8th Circ. 1917),
*Furbee* v. *Alexander*, 31 Idaho 738,
*Evans* v. *Swendsen*, 34 Idaho 290,
*Sanderson* v. *Salmon River Canal Co.*, 34 Idaho 303.

In the case last cited, the Court said:

"The theory is that all of the settlers who purchased water rights and applied the water to the land shall be in the same class, without priorities

> as among themselves, and share alike. * * * The idea of the Carey Act enterprise was to substitute cooperation for individual competition. The contrary view would have caused general confusion and interminable litigation and prevented the success of Carey Act projects."

The mortgage trustees are shareholders and are entitled to precisely the same rights as any other shareholder. The contracts between the company and the settlers constituted a pledge of the shares sold. These contracts, including the pledges of the water rights, were assigned to the mortgage trustees as security for the money advanced by the bondholders to build the system. The mortgage trustees thereby became the pledgees of the shares. Upon default by certain of the purchasers, the pledges were foreclosed and the mortgage trustees purchased the shares at sheriff's sale, all as provided by the federal and state statutes. Therefore, the mortgage trustees stand upon a perfect equality with the plaintiffs. There is no basis for the assertion of any claim by the plaintiffs against the mortgage trustees which is not equally a basis for the assertion of a claim by the mortgage trustees against the plaintiffs.

Furthermore, even if it could be assumed that priority in time of purchase confers a right to a priority in the use of water, that assumption would not help the plaintiffs. There is neither allegation nor proof that they acquired their shares before the predecessors in title of the mortgage trustees acquired theirs. And we may add that such is not the fact.

Assuming the correctness of every contention of the plaintiffs as to the construction and validity of the contracts, the plaintiffs still have nothing more than a contract claim against the company which by every principle of law and equity they cannot enforce against the assets

mortgaged to the bondholders. It would seem that this is substantially admitted by the plaintiffs, for they base their entire argument upon the assumption that the company, and not the mortgage trustees, was the owner of the shares acquired under foreclosure.

The Circuit Court of Appeals was clearly right in excluding from the injunction the shares held by the mortgage trustees throughout, from the commencement of the suit to the time of the trial. The question of the correct number of such shares is discussed at page 4 of this brief.

## POINT THREE.

**The Circuit Court of Appeals should have excluded from the injunction the other shares acquired by the mortgage trustees under foreclosure, *i. e.*, those sold and those acquired by them after the commencement of the suit and before the trial.**

1. The shares acquired by the mortgage trustees under foreclosure after the commencement of the suit and before the trial.

As has been stated, there were 4,255.57 shares acquired by the mortgage trustees under foreclosure after the commencement of the suit and before the trial. These shares were not excluded from the injunction by the Circuit Court of Appeals. The reasons assigned for their original inclusion by the District Court have already been stated and explained, on page 11.

The Circuit Court of Appeals apparently did not recognize the true nature of these shares. After saying that the shares which were *sold* by the mortgage trustees after the commencement of the suit, and which the

court assumed to have been owned by the company, were "issued after the filing of the *lis pendens* and should therefore be included in the injunction", it said that "for the same reason" the shares *purchased* by the mortgage trustees from settlers after the commencement of the action should be included in the injunction. It would seem that the court must have misunderstood the facts, for, clearly, the shares purchased by the mortgage trustees could not be included in the injunction "for the reason" that they were "issued" after the filing of the *lis pendens*—the fact being that these shares were outstanding in the hands of settlers at the commencement of the suit.

Whatever may be the explanation of the decision of the Circuit Court of Appeals, it is clear that the sale of these shares acquired by the mortgage trustees after the commencement of the suit cannot be restrained. We have seen that the plaintiffs have no right to restrain the sale of the shares held throughout by the trustees, and certainly they can have no greater rights against shares which were held by settlers at the commencement of the suit.

If anything more were necessary, it might be mentioned that presumably some of these water rights were acquired within a year before the entry of the decree, so that in some cases its effect is to cut off the statutory right of the former owner to redeem within nine months, and of any person desiring to settle on the land to redeem within the next three months. (Idaho Compiled Statutes, 3026, 3027.)

**2. The shares sold by the mortgage trustees after the commencement of the suit and before the trial.**

There were 3,143.61 shares sold by the mortgage trustees to settlers—Disney, *et al.*, the interveners—after the commencement of the suit and before the trial. It should

be noticed that the decree of the District Court with respect to these shares does something more than merely restrain their sale. It attempts to declare that they shall be of no effect although they are held by bona fide settlers and used in the cultivation of the lands to which they have become appurtenant. There is no warrant for this. We know that if these shares had remained in the hands either of the settlers or of the mortgage trustees throughout, the plaintiffs would have had no standing to restrain their sale. It is therefore unimaginable that the fact that they were transferred from one to the other after the commencement of the suit and before the trial should give the plaintiffs such a right.

## POINT FOUR.

**Negative specific performance should not have been granted to the plaintiffs in the absence of allegation and proof that they had performed their obligations under the contract.**

It is an elementary principle of equity jurisprudence that one party to a contract cannot have specific performance thereof unless he has performed, or offered to perform, the contract on his part. In 4 *Pomeroy's Equity Jurisprudence* (4th ed. Sec. 1407), it is said:

> "The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms."

The reason which sustains this principle is that to grant specific performance against the defendant when the plaintiff has not performed on his part, is to give the plaintiff the full benefit of the contract without having subjected him to its obligations. This, we submit, is precisely what was done in the lower courts.

There is neither allegation nor proof that the plaintiffs have paid, or offered to pay, the company or the mortgage trustees either the stipulated purchase price of their shares, or the portion thereof that they admittedly owe for the benefits they have received. Going outside of the record, the fact is that they have not paid, and do not offer to pay, the company or the mortgage trustees even the amount which they owe upon the basis of the water duty and water supply found by the lower courts and their own construction of the contracts.

It is unconscionable that these plaintiffs should come into a court of equity and ask it to say to the bondholders, whose money built the project—"Turn over to the settlers the security which you took for your advances. If they have not paid you what they owe collect it elsewhere if you can."

## POINT FIVE.

**The alleged admission in the answer that by the contract with the State the company was prohibited from selling shares in excess of the carrying capacity of the irrigation system, has no bearing upon the questions discussed in this brief.**

It will be pointed out in the reply brief of counsel for the company that the answer does not admit that the contract with the State of Idaho prohibited the

company from selling shares in excess of the carrying capacity of the irrigation system. But even if such an admission had been made, it would, of course, have no bearing upon the questions discussed in this brief. As has been pointed out at page 13, the plaintiffs cannot enforce the assumed provision against the mortgage trustees because no one shareholder has a priority over any other shareholder.

It may also be mentioned that the order of the Commissioner of Reclamation of Idaho, made in May, 1915, prohibiting the Irrigation Company from selling additional water rights, did not purpose to apply to any of the shares held or acquired by the mortgage trustees.

## POINT SIX.

### The Circuit Court of Appeals did not change its decision upon the petition for rehearing.

The plaintiffs contend that the Circuit Court of Appeals changed its decision upon the petition for a rehearing and that it was error for it to do so, *ex parte*. They say that the original decision of the Circuit Court of Appeals was that the decree of the District Court should be affirmed, whereas on the petition for a rehearing it decided that the decree should be modified so as to exclude the 5,322.26 shares held by the mortgage trustees throughout. It seems to us to be entirely immaterial whether the Circuit Court of Appeals did change its opinion, and whether, if it did, it lacked jurisdiction to do so on the petition for rehearing. In either event the question whether the sale of these 5,322.26 shares by the mortgage trustees should be enjoined is now before this Court for determination.

In justice to the Circuit Court of Appeals, however, it may be said that it did not change its decision. In its original opinion, it stated that the 5,322.26 shares were not included in the injunction issued by the District Court and that they should not be included. (Rec. 682.) 'Upon the petition for a rehearing, it was called to the attention of the court that the 5,322.26 shares *were* included in the injunction decree of the District Court. The court replied that it was not clear from the decree whether these shares were or were not included; that if they were included the decree should be modified to that extent; that if they were not included the decree should be affirmed without modification. (Rec. 689.) It is too clear for argument that this did not constitute any change in the decision. The question of whether these shares should be included in the injunction was before the Circuit Court of Appeals. It decided that they should not be included, and it so stated in its original opinion. Whether or not it thought that the District Court had included them is, of course, immaterial. The Circuit Court of Appeals has a mind of its own. It stated its conclusion in the original opinion, and it merely repeated that conclusion upon the petition for rehearing.

**The decree of the Circuit Court of Appeals, except in so far as it excludes the 5,322.26 shares from the injunction, should be reversed, and the District Court instructed to dismiss the bill with costs.**

Respectfully submitted,

HARRISON TWEED,
*Counsel for The Equitable Trust Company of New York and Lyman Rhoades, as Trustees.*